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NO. 60

In the Supreme Court of the United States

OCTOBER TERM, 1928.

W. A. FROST, Doing Business Under the Name of Mitchell Gin Company,
Appellant.

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ETC., ET AL.,
Appellees.

BRIEF AND PRINTED ARGUMENT FOR STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW ET AL., APPELLEES.

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Appellees.

BRIEF AND PRINTED ARGUMENT FOR STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW ET AL., APPELLEES.

Statement

This suit was originally instituted in the United States District Court for the Western District of the State of Oklahoma on April 14, 1926, by the filing of a bill by appellant, praying for both an interlocutory and permanent injunction against the Corporation Commission of the State of Oklahoma, together with its members, and the Durant Co-operative Gin Company, seeking to enjoin the Corporation Commission from issuing to the gin company a cot-

ton gin license. Appellant W. A. Frost is an individual doing business under the firm name of Mitchell Gin Company and engaged in the business of operating a cotton gin in the city of Durant, Oklahoma (R. 65).

The Legislature of the State of Oklahoma in 1915 passed an Act declaring cotton gins to be public utilities, and the operation of same for the purpose of ginning seed cotton to be a public business. The Act also provided that no person or persons or corporation should thereafter be permitted to maintain and operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the State Corporation Commission.

Section 3 of the Act sets forth the requirements which must be met by an applicant for license or permission to engage in the business of ginning cotton. This is the section which is immediately involved in this cause. Section 3 of the original Act, which is found at Section 3714, Compiled Oklahoma Statutes 1921, reads as follows, to-wit:

> "That the Corporation Commission, in issuing such license, shall have the right to take into consideration the necessity for the operation of a gin for such purpose at the place it is located; provided, nothing herein shall operate to prevent the licensing of gins now established. If the facts disclose that the ginning facilities afforded by gins already licensed are adequate for the reasonable demands for such place for the ginning of cotton, the said Corporation Commission will be justified in refusing such license; provided, that on the

presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity, the Corporation Commission must issue a license as set out in petition. In addition to said authority said Commission shall have a right to take into consideration the responsibility, reliability and the qualifications, and the capacity of the person or persons, or corporations to do such ginning business as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities, conveniences and services to be afforded the public."

The Legislature of 1925, by House Bill 109, Session Laws 1925, amended Section 3714 by inserting a proviso in the section after the provision with respect to the showing which shall be made by an applicant for a cotton gin, as a condition precedent to the granting of a license, and which proviso reads as follows, to-wit:

> "Provided that on the presentation of a petition for the establishment of a gin *to be run co-operatively*, signed by one hundred (100) citizens and taxpayers in the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

It is this proviso that is being attacked in this cause as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, guaranteeing due process and equal protection of the laws.

The jurisdiction of the District Court was invoked on the ground that the announced intention of the Corporation Commission to issue a license in favor of the Durant Co-

operative Gin Company authorizing it to construct, maintain and operate a cotton gin, was in violation of rights vested in appellant under the Fourteenth Amendment to the Constitution of the United States, and particularly that portion thereof guaranteeing due process of law and the equal protection of the laws. A court of three judges convened pursuant to Section 266 of the Judicial Code, denied the temporary injunction, and appellant prosecuted his appeal to this Court (No. 375, October Term, 1926), and in which appeal this Court affirmed the action of the District Court in denying a temporary injunction on authority of *Chicago, G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 100, in a Memorandum Opinion by this Court on May 2, 1927, *W. A. Frost* v. *Corporation Commission et al.*, 274 U. S. 719, 47 Sup. Ct. Rep. 589, 71 L. ed. —. Thereafter, upon application of appellant the matter was set again before the three-judge court for final hearing upon his application for permanent injunction, and a final hearing was conducted before the same three judges, the Honorable Asa Van Valkenburg, the Honorable J. H. Cotterall, and the Honorable R. L. Williams, on December 13, 1927, after which a decree was entered and an opinion handed down dismissing appellant's bill. 26 Fed. (2nd) 508, *Frost* v. *Corporation Commission et al.* From the decision of the three-judge court, this appeal is prosecuted and involves identically the same questions of fact, as well as the same questions of law which were involved in the original appeal and decided by this

Court upon May 2, 1927. No testimony was taken, the case being tried upon a stipulation of facts identical with the facts presented in the former appeal.

Summary of Agreed Statement of Facts.

For the purpose of the hearing before the three judges, an agreed statement of facts was entered into as set forth in appellant's brief, page 4 (R. 64), which may be briefly expressed as follows:

Appellant W. A. Frost is engaged in the operation of a cotton gin as owner thereof, in the city of Durant, Oklahoma, operating under and by virtue of a license duly issued by the Corporation Commission (R. 65) as provided by Article 40, Chapter 7, Section 3714, C. O. S. 1921, as amended by Chapter 191, Session Laws of Oklahoma 1923, and by Chapter 109, Session Laws of Oklahoma 1925; that it is agreed that the Durant Co-operative Gin Company filed with the Corporation Commission its application in 1926 for permission to establish a cotton gin at Durant, protest having been made by appellant in writing against the issuance of such license or permit, and that a hearing was thereafter had before the Corporation Commission of the State of Oklahoma on April 3 and April 14, 1926 (R. 68) at which time appellant herein objected to the introduction of evidence on the ground that Section 3714, C. O. S. 1921, as amended by the Act of 1925, providing that:

> "On the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Commission shall issue a license for said gin"

is unconstitutional on the ground that it is discriminatory, arbitrary, and denied appellant due process of law and the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States (R. 69).

It was agreed that the Corporation Commission of the State of Oklahoma overruled appellant's objection to the constitutionality of the statute, and that thereupon the Durant Co-operative Gin Company introduced its articles of incorporation, together with the application for the license desired, with the requisite number of signatures attached thereto and requisite under the provisions and terms of the Amendment of 1925; that appellant was denied the right to introduce evidence in support of his protest and was refused permission to cross-examine the applicant's witnesses except upon the question of whether or not full compliance with the statute had been made. It is agreed that in sustaining the objection to the evidence submitted and to the cross-examination, the Commission announced, through Chairman Capshaw (R. 72) as follows:

> "Chairman Capshaw: And the Commission is going to refuse to permit any evidence on behalf of the protestant in regard to the necessity or for the pur-

pose of showing there is no necessity for any additional gins at this point on the theory that under the law passed by the 1925 Legislature, it is mandatory to grant these permits whether there is any necessity or not."

"Mr. Rainey: Exception."

"Chairman Capshaw: The Commission announces that the permit applied for in this cause will be issued by the Commission after a conference of the full Commission and within the next few days. That permit will be held up pending the conference of the full Commission, but will not be held up to exceed a few days."

The full opinion of the three judges in dismissing the bill of complaint and denying the relief petitioned for therein is found on page 29 of the printed record.

Question Presented.

The question presented here is whether the amendment adopted by the Legislature of the State of Oklahoma in 1925, requiring the issuance of a license at the hands of the Corporation Commission *for the operation of gins to be run co-operatively,* signed by one hundred citizens and taxpayers of the community where the gin is to be located, contravenes the Fourteenth Amendment to the Constitution of the United States by denying appellant due process of law and by denying him the equal protection of the law, and the additional question of whether or not appellant by his pleadings and by the stipulated facts has shown sufficient interest to entitle him to maintain this action and to invoke the protection provided by the terms and provisions of the Fourteenth Amendment to the Constitution.

Appellant presents his argument and authorities under the following heads:

1. Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise.
2. The right held by appellant to operate a gin will be protected by a court of equity.
3. Appellant is denied due process of law and equal protection of the laws.
4. The proviso is separable from the remainder of the Act.

Appellees in submitting their argument and authorities will follow the same order and the same division of the questions, with the exception that they shall submit first the question of whether or not appellant shows by his pleadings and the facts stipulated, such an interest as entitles him to raise the constitutional question of the protection afforded by the Fourteenth Amendment to the Constitution of the United States. This issue was raised in the motion to dismiss and answer filed by appellees in the lower court on April 24, 1926, and found at page 6 of the transcript of the record.

ARGUMENT AND AUTHORITIES.

Proposition I.

Appellant has nowhere shown that the enforcement of the challenged statute would deprive it—not another—of some right arising under the Fourteenth Amendment to the Constitution of the United States properly asserted below.

—*Southern R. R. Co.* v. *King,* 217 U. S. 524, 54 L. ed. 868.

Standard Stock Food Co. v. *Wright,* 225 U. S. 540, 56 L. ed. 1197.

Hendrick v. *Maryland,* 235 U. S. 610, 59 L. ed. 385.

Jeffry Mfg. Co. v. *Blagg,* 235 U. S. 571, 59 L. ed. 364.

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Hooker v. *Burr,* 194 U. S. 415, 48 L. ed. 1046.

New York ex rel. Hatch v. *Reardon,* 204 U. S. 152, 51 L. ed. 415.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-operative Assn.,* 72 L. ed. 294.

Rosenthal v. *New York,* 226 U. S. 260, 57 L. ed. 212.

Clark v. *Kansas City,* 176 U. S. 114, 44 L. ed. 392.

Williams v. *Walsh,* 222 U. S. 415, 56 L. ed. 253.

M. K. T. R. R. Co. of Texas v. *Cade,* 233 U. S. 642, 58 L. ed. 1135.

Choctaw Cotton Oil Co. v. *Corporation Commission of Oklahoma*, 247 Pac. 390.

Lee v. *New Jersey*, 207 U. S. 67, 52 L. ed. 106.

Aluminum Co. v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185.

Murphy v. *California*, 225 U. S. 623, 56 L. ed. 1229.

Darnell v. *Indiana*, 226 U. S. 390, 57 L. ed. 267.

Interstate Busses Corp. v. *Holyoke Street Ry. Co.*, 273 U. S. 45, 71 L. ed. 530.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 545, 58 L. ed. 719.

In the case of *Southern Railroad Co.* v. *King*, 217 U. S. 524, 54 L. ed. 868, there was involved the constitutionality of a statute of the State of Georgia requiring railway trains to blow the whistle and to reduce the speed of trains at each whistling post along the line of the railway in that State. In disposing of the contention that the statute was a violation of the commerce act, Mr. Justice Day said with respect to the rights of appellant therein:

> "It is a settled law of this court that one who would strike down a state statute as violative of the Federal Constitution, must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution."

Continuing the discussion, the Court said with respect to the rights asserted by appellant:

"The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mail and in interstate commerce business. *But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional.* * * * *In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.*"

The case of *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 56 L. ed. 1197, *supra,* involved the constitutionality of a statute of the State of Iowa relating to the sale of concentrated commercial feeding stuffs in that State, and requiring the inspection thereof, and in lieu of the inspection fee on condimental, patented, proprietary, or trademark stock or poultry foods, required the payment of a fee of $100.00, whereas the inspection fee generally was 10c per ton, and which the stock food company claimed was a discrimination against it. This Court said:

"If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant 'sells to more than 800 dealers in the State of Iowa, besides a very large number of customers who buy direct from your orator or through its agents,' and that it has been enabled to sell in the State of Iowa during the past year and for a number of

years preceding a quantity of its goods in an amount exceeding $40,000.00 per annum. The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.'' (Citing numerous decisions of this Court, as well as of other Courts.)

The case of *Hendricks* v. *Maryland,* 235 U. S. 610, 59 L. ed. 385, involved an act of the State of Maryland requiring the licensing of automobile vehicles within that State, but providing that any owner or operator of an automobile, non-resident of Maryland, who has complied with the laws of the State in which he resides, requiring the registration of motor vehicles or licensing of operators thereof, may, under specified conditions, obtain a distinguishing tag and permission to operate such machine over the highways for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operators' license; but excluding residents of the District of Columbia from those to whom this last privilege is granted. Appellant, a resident of the District of Columbia, was charged with the violation of this statute and was convicted after raising constitutional questions in defense. The case reached this Court on appeal and was disposed of in an opinion by Mr. Justice McReynolds, in which the Court said:

"If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate grounds for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authorative ruling by the courts of the State, we will not assume that, upon a proper showing, this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, *or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other States under the plain terms of Section 140A. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto.*" (Citing numerous decisions of this and other Courts.)

The case of *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 59 L. ed. 364, involved the classification of employers and employes created by an act of the State of Ohio, and providing that companies employing five or more employes and not taking advantage of the provisions of the act, are deprived of the defenses of the negligence of fellow servants, the defense of assumed risk, and the defense of contributory negligence; while employers of less than five employes might avail themselves of such defenses in damage cases involving personal injuries. It is claimed that this classification was a discrimination and afforded no equal protection under the terms and provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court, in upholding the statute and denying the contention of discrimination and arbitrary classification of employers and employes, also discussed the right of appellant to maintain the statute. Mr. Justice Day, speaking for the Court, used the following language:

> "Much of the argument is based upon the supposed wrongs of the employe, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employe in a shop with five employes with those having less. *No employe is complainnig of this act in this case. The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this Court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.*" (Citing numerous decisions of this Court.)

The case of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239, *supra*, involved the right of a corporation to engage in business in the State of Kentucky under a statute in effect in that State requiring certain acts to be performed as a condition precedent to conducting business in that State, by a foreign corporation. It was contended upon appeal that the statute was unconstitutional and in violation of the commerce clause of the Constitution of the United States. This Court in an opinion by Mr. Justice Van Devanter, after citing the two methods by which causes of action may be appealed from State Courts to this Court, added the language:

"Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage."

In the recent case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Assn.*, 72 L. ed. 294, *supra*, this Court, in discussing the rights of parties attacking statutory provisions upon constitutional grounds, in an opinion by Mr. Justice McReynolds, said:

"In order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below." (Citing cases *supra* and others.)

The case of *Rosenthal* v. *New York*, 226 U. S. 260, 57 L. ed. 212, *supra*, involved the constitutionality of a statute of that State making it a criminal offense for a dealer in or collector of junk, metals or second-hand materials to buy or receive any stolen wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so. The act was contested under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for the reason that the Legislature had failed to extend the protection of the act to other kinds of property when owned by the manufacturers of equipment for railroads, telephone and telegraph lines, as well as when

owned by the companies operating such lines; or the failure to include the owners of blast furnaces and brass foundries or other classes who are liable to loss by theft of articles of like kind. The Court, in disposing of this contention in its opinion by Mr. Justice Pitney, in discussing the right of appellant to raise the question involved, held that the fact that the act had not included all classifications of properties which might be susceptible to loss of the kind included in the statute, did not afford any footing for an attack by plaintiff in error upon the constitutionality of the act, for the reason that he does not bring himself within any of the classes that according to the argument, are peculiarly susceptible to loss of the kind that the statute is designed to prevent, nor does he show that he has suffered any injury by reason of the failure of the Legislature to extend the protection of the act to other classes of owners. (Citing numerous other decisions of this Court.)

The case of *Hooker* v. *Burr,* 194 U. S. 415, 48 L. ed. 1046, involved the rights of a purchaser of property at a foreclosure sale under the terms of a mortgage against the contention that the contract was impaired by changes in the law subsequent to the execution of the mortgage, but prior to the sale of the property with respect to the time of redemption and the rate of interest payable in order to redeem. The Court in its opinion by Mr. Justice Peckham, and in discussing the right of those affected to raise the constitutional question, did so in the following language:

"We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler* v. *Registration Judges,* 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin* v. *Lemon,* 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20. If instead of showing any injury plaintiff shows that he cannot possibly be injured, he cannot of course ask the interference of the court."

The case of *Clark* v. *Kansas City,* 176 U. S. 114, 44 L. ed. 392, is one of the leading decisions of this Court dealing with the question of the right of a party to raise constitutional questions respecting discrimination and unequal protection under the Fourteenth Amendment to the Constitution of the United States. The decision involved a statute of the State of Kansas and a city ordinance of the city of Kansas City pursuant to the statute, providing for the annexation of adjacent territory to cities of the first class in the State of Kansas. The statute provided for the annexation of certain territory which abutted cities of the first class having a population of 30,000 inhabitants or more, but excepted from its provision any "tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation." The statute was upheld by the Supreme Court of the State of Kansas as against the contention that it violated the provisions of the Fourteenth Amendment, and was appealed to this Court. The opinion of the Court was by Mr. Justice Mc-

Kenna, and in the discussion of this principle the Court said:

> "Of the discrimination between owners of agricultural lands, the Supreme Court of Kansas said the defendants in error (plaintiffs here) cannot be heard to complain. Their lands are not agricultural lands, at least they do not allege them to be such lands; but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portion are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kinds of land, and they cannot therefore be heard to complain on that score."

The Court then quotes from the decision of the case of *Albany County Supers* v. *Stanley*, 105 U. S. 305, 26 L. ed. 1044, and from Cooley, Constitutional Limitations, 6th Ed., 196, where the Court and the author said:

> "The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it."

In the case of *Williams* v. *Walsh*, 222 U. S. 415, 56 L. ed. 253, there was involved the constitutionality of a statute of the State of Kansas, making it a criminal offense to sell or deliver black powder for use in coal mines except in original sealed packages containing 12½ pounds of powder. The statute was attacked upon the grounds that it afforded unequal protection under the Fourteenth Amendment to the Constitution of the United States by one who

did not appear to have ever imported black powder from outside the State, and it was therefore held that he could not be heard to raise the question of the validity of the statute upon constitutional grounds. This Court in an opinion by Mr. Justice McKenna in disposing of this question, said:

> "There is another answer to the contention. The law cannot be declared invalid at the instance of one not affected by it, and as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder."

The case of *Missouri, Kansas, Texas Railway Co. of Texas* v. *Cade*, 233 U. S. 642, 58 L. ed. 1135, *supra*, involved the constitutionality of a statute of the State of Texas, fixing and allowing a reasonable attorney's fee to the successful plaintiff in a suit upon a claim against any person or corporation doing business in this State, for personal services, labor performed or for material furnished or for overcharge on freight or express, or for any claim for loss or damaged freight or for stock killed or injured. The law was attacked upon the ground that it was a violation of the commerce clause of the Federal Constitution. This Court, in its opinion by Mr. Justice Pitney, said with respect to this contention:

> "So far as the present attack is founded upon the commerce clause and the act to regulate commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act

in this respect is repugnant to the Constitution and Laws of the United States." (Citing numerous decisions of this and other Courts.)

The case of *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 71 L. ed. 530, *supra*, which is a comparatively recent decision of this Court, involved a statute of the State of Massachusetts requiring operators of motor vehicles, and affording a similar service to that supplied by a railway company between fixed and regular termni, to first secure a license authorizing it to engage in such a business. The business of appellant in that case was both interstate and intrastate. No license was required of interstate operators and defendant had never applied for or secured under the statute, a license authorizing it to operate in any wise. The street railway company sought to enforce the terms and provisions of the statute by causing appellant's employes to be arrested and prosecuted for violation of the statute. Appellant then sought a temporary restraining order in the United States District Court for the District of Massachusetts, and upon trial the bill of complaint was dismissed and the case was then appealed to this Court. This Court, in an opinion by Mr. Justice Butler, in disposing of the contentions that the statute violated the Federal Constitution, did so in the following language:

"The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local au-

thorities or certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 545, 58 L. ed. 719, *supra,* this Court, in an opinion written by Mr. Justice Pitney, in disposing of the contention that an act of the State of Pennsylvania is violative of the Constitution of the United States in prescribing the protection to be afforded employes in coal mines of that State, and particularly discussing the right of litigants to raise constitutional questions, said:

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution, must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him and so operates as to deprive him of rights protected by the Federal Constitution. *Southern R. Co.* v. *King,* 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; *Rosenthal* v. *New York,* 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27."

This contention was dealt with by the Supreme Court of the State of Oklahoma in the case of *Choctaw Cotton Oil Co. et al.* v. *Corporation Commission of Oklahoma et al.,* 247 Pac. 390, which is a companion case to the one now under consideration here. Justice Harrison, in discussing the contention that the provision of the statute is unconstitutional and invalid in that it authorizes the Corporation

Commission to deny petitioners equal protection under the law and to take their property without due process of law as was contended in that case and as is contended here, said:

> "The contention being that the foregoing proviso denies petitioners of equal protection under the law and takes their property without due process of law, the question necessarily arises: *What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What rights of any kind could the licensing of another gin affect?* It does not destroy the property of petitioners nor prevent the free operation of their gins. The only right which could be affected by such a license is the right of petitioners to operate their gin without competition. A right which is not secured to them either by the State or Federal Constitution; hence the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

The general rule with respect to the interest essential to the raising of constitutional questions, is stated in Ruling Case Law, Vol. 6, page 89, paragraph 87, as follows:

> "Before a law can be attacked by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringment on his rights. One who is not prejudiced by the enforcement of an act of the Legislature cannot question its constitutionality or obtain a decision as to its invalidity on the ground that it impairs the rights of others."

Applying this principle to the case now before the Court, nowhere in the record is it claimed by appellant that

he has been denied anything whatsoever at the hands of the Corporation Commission of the State of Oklahoma *under the statute complained of.* Upon the contrary, the pleadings (R. 1), as well as the stipulation (R. 61), disclose that appellant has for a number of years held a license authorizing him to operate a cotton gin in the city of Durant, and that he has operated said plant, and so far as the record discloses, intends to operate it in the future.

In order for appellant to be heard to complain as to the constitutionality of the statute under consideration, we contend that he must have applied for a license under the general provision of the statute and have been subjected to some discrimination or some unequal burden in the disposition of that application as a condition precedent to his complaining in the Federal Court as against the constitutionality of said statute. But the facts disclose that he has been denied nothing, has suffered nothing, and as pointed out by the decision of the Supreme Court of the State of Oklahoma, the only objection which he can reasonably urge against the licensing of co-operative gins under the provision of the statute is that he fears competition.

Proposition II.

Appellant, under Proposition I of his Argument and Authorities, asserts that:

> **"Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise."**

He then asserts that the grant of the right to operate a gin can be secured from the sovereign alone, and that it is essential and permits the holder to engage in a business which he could not engage in without the grant. This contention was also made before the Court composed of the three judges, and was disposed of by the Court (R. 29) in the following language:

> "As to whether the complainant operates his gin under a franchise or license that is not essential to determine. In Oklahoma perpetual and exclusive franchises are prohibited. Oklahoma Constitution, Art. 2, Sec. 32; Art. 5, Sec. 51, and Art. 18, Sec. 7. In *Boise City Artesian Hot & Cold Water Co.* v. *Boise City* (9th C. C. A.), 123 Fed. 252, it is held that an ordinance granting right to lay and repair water pipes in the streets and alleys of the city, but without fixing any term for the privilege, is a grant of a license only, revocable at the will of the city, since it had no power to grant a perpetual franchise, and that appears to be the rule supported by the weight of authority. It is assumed that complainant may maintain this action under said status if the proviso assailed by him is void, but conclude that he did not have such a vested right as to prevent the passage of said proviso if it does not amount to an arbitrary or unreasonable classification."

Appellant, in support of his proposition that the right

to maintain and operate a gin is a franchise or a property right in the nature of a franchise, cites the following cases:

—*McPhee et al.* v. *Union Pacific Railway,* 158 Fed. 5, 10.

New Orleans Gas Co. v. *Louisiana Light Co.,* 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. ed. 516.

Walla Walla v. *Walla Walla Water Co.,* 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. ed. 341.

Denver v. *City Cable Co.,* 22 Colo. 565, 45 Pac. 439.

Donahue v. *Morgan,* 24 Colo. 389, 390, 400, 50 Pac. 1038.

Thomas v. *Grand Junction,* 13 Colo. App. 80, 81, 65 Pac. 665.

City of Denver v. *Denver Union Water Co.* (Colo.), 91 Pac. 918, 919.

Morgan v. *Lee,* 93 U. S. 217, 213.

California v. *Pacific R. R. Co.,* 127 U. S. 1, 40.

Owensboro v. *Cumberland T. & T. Co.,* 230 U. S. 58, 65.

Trustees, etc., of South Hampton v. *Jessup,* 56 N. E. 538.

State v. *Country Club,* 173 S. W. 570.

A careful study of these decisions, however, disclose that none of them can in any wise be construed as supporting the proposition announced. In none of the decisions is any right involved in any respect similar to the right held by a cotton ginner under the statutes of the State of Oklahoma. They deal with the rights of gas, electric, telephone

and water companies to use and occupy streets and public places in the conduct of their business.

In the case of *McPhee et al.* v. *Union Pacific Railway,* 158 Fed. 5, 10, *supra,* a distinction is drawn between franchise rights and the rights under mere licenses. However, in that case a franchise had been refused at an election held in the city of Denver, and thereupon the City Council proceeded by ordinance to grant to the railway company a revocable permit to occupy and use the streets. The Court held that this was a license instead of a franchise.

The case of *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, *supra,* which involved an exclusive franchise for the sale and distribution of gas, does not define either a license or franchise, but deals with the right of a State to grant exclusive franchises, and holds that when such franchise is granted it is a contract which may not be abrogated even by the State.

The case of *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, involved substantially the same question as was involved in the New Orleans Gas Co. case, except that it involved the right of the city itself to issue bonds to construct and operate a waterworks system in competition with the holder of an exclusive franchise previously granted by the city.

The case of *Denver* v. *City Cable Co.,* 22 Colo. 565, 45 Pac. 439, *supra,* involved the right of the city of Denver

to impose additional onerous burdens which were in no way connected with or related to the operation of the street railway, upon the street railway, holding the franchise, in addition to those contained in the franchise. It was held that such an imposition was invalid as impairing the obligations of a contract.

In the case of *Donahue* v. *Morgan,* 24 Colo. 389, 50 Pac. 1038, *supra,* there was involved the rights of a holder of a franchise in a city which was later consolidated with two others as against one of the other towns in connection with the ownership and operation of its own municipal plant, with particular respect to extensions and improvements of service. The question was the infringment or impairment of the contract, and did not involve the question here under consideration.

The case of *City of Denver* v. *Denver Union Water Co.,* 91 Pac. 918, which was a rate case, involved the franchise requirement that the water company, after five years of operation under the rate fixed by the franchise, was required to apply the average rate effective in Chicago, St. Louis and Cincinnati, and it was held that such a requirement was inoperative and invalid.

The case of *Morgan* v. *Louisiana,* 93 U. S. 219, *supra,* there was involved the question of whether or not the transfer and sale of public service property exempt from taxation by statute as to original grantee, also transferred the

immunity from taxation to transferee. It was held that such an immunity was a personal privilege and did not run with the franchise.

The case of *Owensboro* v. *Cumberland T. & T. Co.*, 230 U. S. 58, *supra*, involved the rights of a telephone company which had secured by city ordinance the authority to erect its poles, wires, etc., in the streets and to connect telephone users therewith as against a later ordinance requiring the company to remove its facilities from the street or be subjected to a removal of same at the hands of the city authorities unless the company purchase from the city a new franchise. It was held that the original order granted a franchise which could not be impaired by a later ordinance such as was proposed.

The case of *Trustees, etc., of South Hampton* v. *Jessup*, 56 N. E. 538, involved the right conveyed by the board of trustees of a municipality to defendant to construct a roadway and draw bridge across a waterway, and the right of the trustees later to enjoin the construction on account of the character of roadway being constructed, notwithstanding the resolution granting the right was silenced thereon; grantee claiming his right to be a franchise irrevocable after acceptable and partial execution. It was held that this right was a franchise.

In the case of *State* v. *Country Club*, 173 S. W. 570, a Texas case, involved the right of the State to enjoin club

owners from selling intoxicating liquors without license, and in which the Court referred to the right of the holder of a whisky license as a holder of a franchise. The language of the Court in that regard was purely dictum and the decision is in no wise applicable.

The case of *Boise Artesian H. & C. Water Co.* v. *Boise City*, 230 U. S. 84, 57 L. ed. 1400, cited by appellant, involved no such right as is here under consideration, but did involve a municipal grant of the right to occupy the city streets with the pipes of a water distributing system, and the right thereafter of the city to impose additional burdens in the way of payment to the city of a monthly rental for such use and occupation of the streets. This Court held that this grant, when accepted, is not a mere revocable license, but a substantial property right, which could not be impaired by imposing additional burdens after its acceptance.

The case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, involved an act of Congress authorizing the Secretary of War to condemn and appropriate property of the Monongahela Navigation Company, and this Court held that the franchise of the navigation company constituted property which could not be taken for public use without just compensation. The question involved was the taking of the physical property as well as the franchise from the navigation company in its

entirety, and did not involve the exclusive right to operate property as against the right of the State to grant other licenses or franchises.

The case of *Charles River Bridge Co.* v. *Warren Bridge et al.*, 11 Peters 420, upheld the right of the State of Massachusetts in granting a competitive franchise to the Warren Bridge Company, which, in effect, destroyed the business of the Charles River Bridge Company. In this case, however, Chief Justice Teney pointed out at considerable length that the power of the State to grant franchises and to exercise the right of police power, may be so used as to destroy the value of a franchise formerly granted to another corporation. In that case this Court, in dealing with the rights of competitive concerns holding franchises, said:

> "The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River bridge nor make the way to it or from it less convenient. *None of the faculties or franchise granted to that corporation have been revoked by the Legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury or in any degree affected their right of property if it had not diminished the amount of their tolls. In order, then, to entitle them-*

selves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated that contract by the erection of the Warren bridge."

The case of *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, is another case involving the condemnation of property and franchise of a public service concern, to-wit, a water company, incident to public ownership thereof. This Court held that the franchise held by the Long Island Water Supply Company was not exclusive and that the exclusiveness incident to its right might at any time be taken from it by the Legislature or by local authorities acting under legislation. The Court said:

"The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town and contained a covenant on the part of the town to pay certain hydrant rental; but grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege." (Citing *Charles River Bridge Co.* v. *Warren Bridge*, 11 Pet. 420, *supra; Washington & Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210; *Stein* v. *Beinville Water Supply Co.*, 141 U. S. 67; *Hamilton Gas Light & C. Co.* v. *Hamilton*, 146 U. S. 258; *Syracuse Water Co.* v. *Syracuse*, 116 N. W. 167, 5 L. R. A. 546.)

The case of *Beinville Water Supply Co.* v. *Mobile*, 186 U. S. 212, involved the power of the Alabama Legislature to revoke the exclusive features of a franchise held by the water company by the granting of an additional charter authorizing the holder to engage in the distribution of

water for public consumption in the city of Mobile. The authority of the Legislature was upheld by this Court in an opinion by Mr. Justice Brewer, the Court holding that the franchise was not exclusive and that the State was authorized to charter and grant franchises to others desiring to engage in that business. In discussing the relationship of the two holders of franchises, and the rights of the State, the Court said:

> "It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation. As said by Chief Justice Waite in speaking of the power of amendment in *Sinking Fund Cases*, 99 U. S. 700, 720; *Union P. R. Co.* v. *United States*, 25 L. ed. 496: 'All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property, so we need not stop to consider what protection could be afforded if the attempt had been made to take away its property."

In the case of *Bartlesville Elec. & Power Co.* v. *Bartlesville Int. Ry. Co.*, 26 Okla. 453, there was involved the right of the holder of a legally granted franchise as against a competing concern which attempted without authority from the city, to use the streets, lanes and public places of the city for the purpose of erecting a system of poles and wires for supplying the city of Bartlesville and its inhabitants with electric light and power in competition to

the holder of the franchise. This case upon its face discloses its entire inapplicability to the principles here under discussion. However, the Court in its opinion, in discussing the rights of the two concerns, also discusses the status which the parties would occupy had defendant been granted legally the franchise or permit to engage in business in competition to plaintiff. The Court says:

> "When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant to other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices, except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise and to have agreed thereto, when it accepted the franchise; but such cannot be said of the defendant, who unlawfully occupies the streets and public grounds of the city in competition with plaintiff."

The case of *Henry et al.* v. *Bartlesville Gas & Oil Co.*, 33 Okla. 473, as in the case of *Bartlesville Electric & Power Co.* v. *Bartlesville Int. Ry. Co.*, 26 Okla. 453, *supra*, involved the right of the Bartlesville Gas & Oil Company, a corporation, holding a valid franchise granted by the city of Bartlesville, as against an individual, to-wit, R. L. Henry, the holder of a competing franchise also regularly granted by the city of Bartlesville, and in which the court

held that the franchise held by Henry and his assignees was void for the reason that Section 4846, Snyder's Compiled Laws 1909, by implication, limits the right to corporations only, and does not authorize the granting of a franchise to an individual.

As to the distinction between a franchise and a license, it appears to us that the most clear distinction of any which we have been able to find in the decisions of the various courts, is found in the decision of the Nebraska Supreme Court in the case of *Omaha & C. B. Street Railway Co.* v. *Omaha,* 208 N. W. 123, P. U. R. 1926D, page 629. In that case the court was considering a very similar provision to that which is being considered in this case. The City of Omaha had passed and approved an ordinance regulating auto busses as common carriers of persons within the city of Omaha. The ordinance provided, among other requirements, for investigation of applicants seeking to engage in the business, either as proprietors or as drivers, providing rules to be observed by those engaging in such employment; confines operations of licensees to routes having fixed termini; restricts charges for services to a definite sum; *requires as a condition precedent to commencement of business the filing of a good and sufficient bond, conditioned for the payment of all damages sustained by any person due to negligence committed in the operation of the busses; prohibiting under penalties any person from engaging in the business without compliance*

with the terms of the ordinance, including a written license, by its terms subject to revocation. In discussing the distinction between a franchise and a mere license, the Court in its opinion said:

> "It is to be remembered that the power to create and confer a right not theretofore existing is distinct and different from permitting under proper regulation the exercise of power possessed by the citizens generally of common right. Is, therefore, the carriage of persons in auto busses over the public streets of Omaha by common carriers exercised solely pursuant to grant, or is it, in the absence of legislation, the exercise of a common right? In other words, is the ordinance a grant or a regulation?
>
> "The right to use the public highways of the State by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the State, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the Legislature to the governing bodies of municipal corporations. 13 R. C. L. 251-255; *White Oak Coal Co.* v. *Manchester,* 109 Va. 749 (64 S. E. 944), 132 Am. St. Rep. 943; *Bogue* v. *Bennett,* 156 Ind. 478 (60 N. E. 143), 83 Am. St. Rep. 212; *Commonwealth* v. *Stodder,* 2 Cush. (Mass.) 562, 48 Am. Dec. 679); *Sumner County* v. *Interurban Transp. Co.,* 141 Tenn. 493 (213 S. W. 412), 5 A. L. R. 765; *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (51 N. E. 758), 42 L. R. A. 696, 68 Am. St. Rep. 155; *Dent* v. *Oregon City,* 106 Ore. 122, 211 Pac. 909.
>
> "It follows, therefore, that the terms of the ordinance in controversy in this action must be construed not as a grant, but as a regulation of a right pre- exist-

ing. This conclusion disposes of plaintiff's contention that the ordinance in question is one of the class described as 'any ordinance or resolution, granting, extending, changing, or modifying the terms and conditions of a franchise.' Comp. St. 1922, Section 3719."

Also in the case of *McCutcheon* v. *Wozencraft* (Texas Civ. App..), 230 S. W. 733, it was held in a case involving similar facts and principles:

"The rights to run over the streets of a city to be granted to motor bus operators under the terms of proposed ordinances held not to come within the meaning of the term 'franchise' as used in the Dallas City Charter, Section 8, subdivision 2, giving the city power to confer on any person or corporation franchises or rights to use the property of the city to furnish any general public service."

There are also cited in support of this principle, the following cases:

—*Ex parte Dickey,* 76 W. Va. 576, P. U. R. 1915C 93, 85 S. E. 781, L. R. A. 1915F 840.

Burgess v. *Brockton,* 235 Mass. 95, 126 N. E. 456.

Dallas v. *Gill* (Tex. Civ. App.), 199 S. W. 1141.

Lindsley v. *Dallas Consol. Street R. Co.* (Tex. Civ. App.), 200 S. W. 207.

Peters v. *San Antonio* (Tex. Civ. App.), 195 S. W. 989.

Boise City Artesian Hot & Cold Water Co. v. *Boise City,* 59 C. C. A. 236, 123 Fed. 232.

Grand Rapids G. H. & M. R. Co. v. *Stevens,* 219 Mich. 332, 189 N. W. 2.

In 12 Ruling Case Law, page 178, is discussed the dis-

tinction between franchise and license, or easement, and it is said with respect thereto:

> "A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. A franchise, however, is neither personal nor temporary; nor is it revocable."

In this connection we may be permitted to suggest that the statute heretofore set out clearly indicates that the right to operate a cotton gin under this statute is a personal right, for the reason that the applicant must appear and must make a showing that he is a suitable person both with respect to character and ability, financial and otherwise, to carry on the project under consideration. We may observe also that the license granted was not assignable without permission and approval of the Corporation Commission of the State of Oklahoma, and that licenses granted to co-operative concerns, *is specifically limited to the operation of gins co-operatively, and may not, without the Corporation Commission's consent, be operated otherwise.*.

Also in 12 Ruling Case Law, at page 197, there is discussed the rights of a holder of a franchise, and as to what constitutes an exclusive grant it is said with respect to franchises:

"The grantee takes nothing in that respect by inference. Accordingly, where the grant is not by its terms exclusive, the Legislature is not precluded from granting a similar franchise, or authorizing the construction of a rival way or structure, which may greatly impair, or even totally destroy, the value of the former grant, and such damage is not the taking of a former franchise which entitles its owner to compensation." (Citing *Dyer* v. *Tuskalooso Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Indianapolis Cable St. R. Co.* v. *Citizens St. R. Co.*, 127 Ind. 369. 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; *Clarksville, etc., Turnpike Co.* v. *Montgomery County*, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155.)

As an example of the applicability of this principle, the text cites the leading case in this country of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 U. S. (L. ed.) 773.

In 17 Ruling Case Law, at page 476, under the head of "Constitutionality of License Tax Generally," and the "Obligation of Contracts in General," it is said:

"A license is not a contract between the State and the licensee and is not property in any constitutional sense." *Gibbons* v. *Ogden*, 9 Wheat 1, 6 U. S. (L. ed.) 23; *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528, 25 U. S. (L. ed.) 912; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 U. S. (L. ed.) 419; *Stone* v. *Fritts*, 169 Ind. 361, 82 N. E. 792, 14 Ann Cas. 295, 15 L. R. A. (N. S.) 1147; *Lowell* v. *Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458; *Simmons* v. *State*, 12 Mo. 268, 49 Am. Dec. 131; *Wallace* v. *Reno*, 27 Nev. 71, 73 Pac. 528, 103 A. S. R. 747, 63 L. R. A. 377; *Portland* v. *Cook*, 48 Ore. 550, 67 Pac. 772, 9 L. R. A. (N. S.) 733; *Littleton* v. *Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

In the same paragraph (paragraph 5) it is also said:

> "Following the general principle that a license is not a contract, it is clear that it does not in itself create any vested right, or permanent right, and that free latitude is reserved by the Legislature to impose new or additional burdens on the licenses, or to alter the license or to revoke or annul it. And this is the general rule notwithstanding the expenditure of money by the licensee, in reliance thereon, and regardless of whether the term for which the license was given has expired."

Volume 6, R. C. L., page 482, Section 481, states the principle of the interest possessed by one holding a license to engage in a business, as follows:

> "No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control and regulation under the police power. Accordingly it is held that statutes prescribing the qualifications of persons engaged in professions requiring them to take out a license, in no manner impair any vested right as respects those who are practicing in the State prior to the passing and going into effect of such statutes. For example, due process of law is not denied in requiring an examination and license before one can engage in the occupation of an architect. Similarly it is clear that the State, by permitting the keeping of pool rooms, cannot be said to give an assurance that they may continue, and hence it is not estopped from subsequently prohibiting their operation. The mere fact that an enactment under the police power strikes down a business of profit or renders property of little value and of no use, does not give any basis to a contention that it has been taken without due process of law.
>
> "*State* v. *Havorka,* 100 Minn. 249, 110 N. W. 870, 10 Ann. Cas. 398, 8 L. R. A. (N. S.) 1272; *Reetz* v. *Mich.,* 188 U. S. 805, 23 S. Ct. 390, 47 U. S. (L. ed.) 563;

Collins v. *Texas,* 223 U. S. 288, 32 S. Ct. 286, 56 U. S. (L. ed.) 439; *State* v. *Gravett,* 65 Ohio St. 289, 62 N. E. 325, 87 A. S. R. 605, 55 L. R. A. 791; *State* v. *Carlisle,* 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B 395, and note; *Klafter* v. *State Board of Examiners of Architects,* 259 Ill. 15, 102 N. E. 193, Ann. Cas. 1914B 1221, 46 L. R. A. (N. S.) 532; *Burlingame* v. *Thompson,* 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64."

In the same volume, Ruling Case Law, page 483, Section 483, it is again said:

"No one would venture to question the general proposition that a corporation whose property is devoted to a public use, as is that of a carrier, is subject to reasonable regulation by the State. While it is entitled to the protection of the guaranty of due process of law, the nature of its business divests its property of some of the protection to which it would otherwise be entitled. The guaranty of due process of law protects such a corporation in two different aspects, when the rates to be charged by it are sought to be regulated. In the first place it is entitled to notice and an opportunity to be heard before a commission which is to take action with reference to its charges, and in the second place it is entitled to a fair return for the use of its property, and the Legislature cannot, consistently with the guaranty of due process of law, deprive it of this right."

(Citing: See par. 467, see Carriers, Vol. 4, 607; *Chicago M. & St. P. R. Co.* v. *Minn.,* 134 U. S. 418, 10 S. Ct. 462, 702, 33 U. S. (L. ed.) 970 And see Carriers, Vol 4, p. 624. *Reagan* v. *Farmers Loan & Trust Co.,* No. 1, 154 U. S. 362, 14 S. Ct. 1047, 38 U. S. (L. ed.) 1014.)

Also in 17 R. C. L. at page 474, in defining the nature and purpose generally of a license, it is said:

"In its specific sense, to license means to confer on

a person the right to do something which otherwise he would not have the right to do. A license is in the nature of a special privilege, and not a right common to all; and it is often required as a condition precedent to the right to carry on business or to hold certain classes of property within the jurisdiction. *It is not a property right or a contract.* Implying a privilege, it cannot possibly exist with reference to something which is a right, free and open to all." * * *

The same work, at page 475, paragraph 4, says:

"A license being a personal privilege, cannot, as a general rule, be communicated or assigned to another. * * *"

In this connection the language of the Supreme Court of the State of Oklahoma, in the case of *Choctaw Cotton Oil Co. et al.* v. *Corporation Commission of Oklahoma et al.*, 247 Pac. 390, *supra,* in deciding the companion case to the one now under consideration, is particularly applicable. The court in deciding the case and in discussing the property rights involved, used the following language:

"The contention being that the foregoing proviso denies petitioners of equal protection under the law and takes their property without due process of law, the question necessarily arises, what property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitutions; hence the contention as to taking their property without due process of law can-

not be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

In the case of *In re. Farmers Co-operative Gin at Bochito, Oklahoma,* 122 Okla. 115, 251 Pac. 729, the Court adopted this same principle, and decided the case without an opinion, for the reason that the opinion in the former case just quoted from, ruled the case then under consideration.

The Constitution of the State of Oklahoma contains two provisions which are particularly applicable in connection with this contention. Section 32 of Article 2 provides:

> "Perpetuties and monopolies are contrary to the genius of a free government and shall never be allowed; * * *."

Section 51 or Article 5 provides:

> "The Legislature shall pass no law granting to any association, corporation or individual any exclusive rights, privileges or immunities within this State."

Upon this question we also call attention to Pond on Public Utilities (3rd Ed.). Section 203 lays down the principle in the following language:

> "Impairment of Franchise Rights by Competition Not Prohibited. That the effect of contracting with or creating another municipal public utility does not violate the contract rights or interests protected by the Constitution where the former company did not secure an exclusive right or franchise is well expressed in the case of *Revere Water Co.* v. *Winthrop,* 192 Mass. 455, 78 N. E. 497, 207 U. S. 604, 52 L. ed. 360, 28 Sup.

Ct. 253, decided in 1906 in the following language: 'This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served by conferring such authority was for the Legislature to determine. It is manifest that if any independent system might be thus established, the defendant's property would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under St. 1882, p. 101, c. 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Nor is legislation of this nature an appropriation of private property for a public use without due process of law under the Fourteenth Amendment to the Federal Constitution.''

We therefore conclude that the nature of the right possessed by appellant under its license to operate a cotton gin, is clearly distinguishable from the right possessed by the holders of a franchise to occupy streets and public places granted by the sovereignty. We further contend that even though the right possessed by appellant is in the nature of a franchise, the legislative authority of the State of Oklahoma is empowered under the facts in this case to classify in a constitutional way co-operative organizations as was done in the case now under consideration, and that appellant would have no right to complain of such classification.

Proposition III.

Counsel for appellant, under their Proposition II, asserts:

"The right held by appellant to operate a gin will be protected by a court of equity."

The correctness of this proposition would depend entirely upon what is meant by protection. The right, privileges and property held by appellant under a license or franchise, will be protected where those rights are invaded in an unconstitutional manner, but as shown by the cases already cited under Proposition II, the right and privilege to operate free from competition will not be protected by a court of equity. Neither does the right of the holder of a franchise or license guarantee or protect such holder from the legal granting of additional franchises or license even though the effect of such granting of an additional license might result in damage to the original holder. The decisions cited by counsel under this proposition all hold to this effect without a single exception.

—*Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58, 65.

Boise City v. *Boise City, etc., Water Co.*, 230 U. S. 84.

Charles River Bridge Co. v. *Warren Bridge Co.*, 11 Peters 420.

Bartlesville Electric Light & Power Co. v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 29 L. R. A. (N. S.) 77.

Tulsa St. Ry. Co. v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 342, 343.

Henry v. *Bartlesville Gas & Oil Co.*, 33 Okla. 473, 478.

Melville Gas Light Co. v. *Vineland Light & Power Co.*, 72 N. J. Eq. 305.

Peoples Transit Co. v. *Henshaw*, 20 Fed. (2nd) 87.

Pomeroy's Equity Jurisprudence, Vol. 5, Secs. 2016, 2017.

Proposition IV.

Is appellant denied due process of law and equal protection of the laws?

In the outset we desire to state that if there is any possible method by which cotton gins operated co-operatively may be distinguished reasonably from the operation of the ordinary commercial cotton gin, then, in our opinion, the act must stand, regardless of the method or manner of the organization of the Durant Co-operative Gin Company. This is true for the reason that the act does not undertake to define what it takes to constitute a gin, co-operatively operated and maintained. In the discussion of this proposition, which we consider to be the major and controlling question in the case, we shall first refer to the decisions cited by counsel in support of his contention that the act is an arbitrary classification resulting in the deprivation of his clients of the equal protection of the law. After discussing those cases we shall then refer to such cases as we may have been able to find, which, in our opinion, will support the classification undertaken by the Oklahoma Leg-

islature, as well as the nature of the business of cotton ginning and its relative importance to the population of the State of Oklahoma.

Authorities of Appellant Reviewed.

The first case cited by appellant is the case of *Ex parte Virginia,* 100 U. S. 339. In this case there was involved the question of exclusion of colored persons from jury service. This Court properly held that this was a denial of the equal protection of the laws, and it is a fundamental principle in constitutional law that classification cannot be made upon the basis of color.

In the case of *Barbier* v. *Connolly,* 113 U. S. 27, and the case of *Soon Hing* v. *Crowley,* 113 U. S. 703, cited by appellant, there was involved an ordinance of the City of San Francisco with respect to the safeguards which should be thrown around the operation of laundries. In each of these cases the Court upheld the provisions of the ordinance, but called attention to the fact as quoted by counsel in their brief, that "no impediment shall be imposed to the pursuits of anyone except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others *in the same calling and condition.*"

In the case of *Yic Wo* v. *Hopkins,* 113 U. S. 356, cited, which was also a laundry case involving a city ordinance

of San Francisco, the Court held that on account of the showing that the ordinance was being directed particularly at the Chinese race of people, that unequal protection of the law was afforded. It is fundamental that legislation must not be classified upon citizenship.

In the case of *G. C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, the State of Texas had imposed an attorney's fee, not to exceed $10.00 in addition to costs, upon railway corporations omitting to pay claims within a certain time after presentation, which did not apply to any other corporation or individual, and this was properly held to be a denial of the equal protection of the laws.

In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, cited by counsel for appellant, there was involved the anti-trust act of the State of Illinois, but which act specifically exempted in the ninth section thereof, agricultural products or live stock while in the hands of the producer or raiser. It was pointed out in that case that the classification which exempted agricultural products and live stock products might result in the most vicious of all monopolies or combination in restraint of trads, and that therefore the provision was in violation of the Fourteenth Amendment to the Constitution of the United States. The Court, however, in its opinion by Mr. Justice Harlan, discusses at great length the principles which should enter into the matter of classification for legislative purposes. It is said, page 558:

"What may be regarded as a denial of the equal protection of the laws, is a question not always easily determined, as the decisions of this Court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means '*that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances.*'

* * * * * * * * *

"That no impediment should be interposed to pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than is prescribed for all like offenses."

In the case of *Cotting* v. *Kansas City Stockyards Company and State of Kansas,* 108 U. S. 79, the State of Kansas undertook to regulate stockyards both as to the manner of their operation and as to price to be charged for certain service rendered by the stockyards to their patrons. It based the regulation entirely upon the number of head of cattle, or hogs, or sheep handled for the preceding twelve months, providing that a stockyard handling not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep during the preceding twelve months shall be declared to be public stockyards and subject to the regulation. The act

was attacked upon the grounds that it violated the Fourteenth Amendment to the Constitution of the United States. It was held to violate that provision after distinguishing numerous cases which had held legislative classification not within the inhibition of this provision of the Constitution. However, the Court, in its opinion, clearly recognizes the right of the various States of the Union to classify legislative subjects and discusses their latitude in so doing. The Court in its opinion says:

> "So, again, exercising the undoubted right of classification, it may even happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed upon certain classes of business, while others are exempt. *It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens.* It would strip the Legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another."

The case of *Traux* v. *Raich*, 239 U .S. 33, an act of the State of Arizona of December 14, 1914, requiring every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers to employ not less than 80 per cent qualified electors or native-born citizens of the United States, or some subdivision thereof," was held to be in violation of the Fourteenth

Amendment to the Constitution of the United States as denying equal protection of the laws.

In the case of *Hayes* v. *Missouri*, 120 U. S. 68, the Court had under consideration a provision of the Missouri statute providing that in all capital cases, except in cities having a population of over 100,000 inhabitants, the State shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen. The defendant Hayes, being indicted in the criminal courts of St. Louis, a city of over 100,000 inhabitants, and having been convicted, attacked the act as being violative of the Fourteenth Amendment to the Constitution of the United States. This Court in an opinion by Mr. Justice Field, denied the contention and upheld the Missouri act as not being repugnant to the constitutional provision. The Court in its opinion, discussing this principle, said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely required that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. * * * But legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." (Citing *Barber* v. *Connolly*, 113 U. S. 27.)

In the case of *Traux* v. *Corrigan*, 257 U. S. 312, 66 L.

ed. 254, there was involved a statute of the State of Arizona prohibiting interference by injunction between employers and employes in cases growing out of a dispute concerning terms or conditions of employment which, under the statute, would have been entirely proper in cases not involving disputes between employers and former employes. This statute was held to be in violation of the Fourteenth Amendment for the reason that the classification was based upon the relation of an employer, not to an employe, but to one who has ceased to be such in respect of torts committed by such employe on the business and the property right of the employer.

The case of *Southern Railway Co.* v. *Green,* 216 U. S. 400, 54 L. ed. 536, involved a franchise tax imposed by the State of Alabama upon foreign corporations, which had already come into the State in compliance with its laws and required property of a fixed and permanent nature upon which it had paid all taxes levied by the State prior to its subjection to the franchise tax, but did not impose such burden upon domestic corporations. The Court, in discussing the reasonableness of classification, disposed of the matter in the following language:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; a classification cannot be arbitrarily made without any substantial basis."

The case of *A. T. & S. F. Ry. Co.* v. *Vosburg,* 238 U. S. 56, 59 L. ed. 1199, involved the constitutionality of a statute of the State of Kansas allowing a reasonable attorney's fee to a shipper who successfully sues a railway company for failure to furnish cars while no such allowance is made in favor of a railway company in the event of its successful prosecution of a suit brought by it under such statute against a shipper who has failed to use the cars promptly. The Court, distinguishing this case from the case of *Missouri, K. & T. R. Co.* v. *Cade,* 233 U. S. 642, 58 L. ed. 1135, sustaining a statute of the State of Texas, providing that if certain claims were not paid by the railway company within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented, he should recover the amount claimed with costs, and in addition, a reasonable amount as attorney's fees; and in that case the Court held that the classification was constitutional and did not constitute a discrimination between different citizens or classes of citizens, since members of any and every class *may either sued or be sued,* holding it to be erroneous to test the classification as in the instant case, by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of action respecting car service. The Court held that:

"Actor and reus differ in their respective attitudes

towards a litigation. The former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the cost."

In the case of *Power Mfg. Co.* v. *Harvey Saunders*, 274 U. S. 490, 71 L. ed. 1165, this Court had under consideration a statute of the State of Arkansas permitting foreign corporations to be sued in any county in the State when it has established its right to do business in the State, whether it does business or is present or has a representative in the county or not, while suits against domestic corporations and individuals can be tried only in counties where they are found or do business or have a representative. The statute was attacked as being violative of the Fourteenth Amendment to the Constitution, and this contention was upheld. The Court, however, in disposing of this contention, in its opinion by Justice Van Devanter, referring to the Fourteenth Amendment, said:

> "It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation. * * *"

The Court, continuing, said:

> "Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statute means foreign corpo-

> rations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals."

In the case of *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania,* 72 L. ed. 607, cited by appellant, there was involved a statute of the State of Pennsylvania, imposing a tax upon the gross receipts of corporations operating taxicabs, when it was not imposed upon individuals and partnerships engaged in the same business. The act was attacked on the ground that it violated the equal protection clause of the Fourteenth Amendment, and this Court held that such a statute was discriminatory as against such corporations. The Court, however, in its opinion, which was by Mr. Justice Butler, reaffirmed the time-honored principle of classification for legislative purposes, in the following language:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to difference in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation." (Citing *Power Mfg. Co.* v. *Harvey Saunders,* 274 U. S. 490.)

Authorities Supporting the Constitutionality of the Act.

In support of the constitutionality of the act now under consideration, we desire first to call the attention of the Court to the language of the amendment under discussion, for the purpose of attempting to show that the classification is not made on the basis of ownership, but that it is made upon the basis of the manner of the operation of the cotton gin. The language of the proviso is as follows, to-wit:

> "Provided that on the presentation of a petition for the establishment of a gin *to be run co-operatively,* signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

The classification imposed is not based upon ownership but upon the manner of operation. No one is denied anything. Any collection of one hundred citizens and taxpayers of the State of Oklahoma may secure a license for a gin to be run co-operatively, exactly in the same manner; the only limitation being that they must have one hundred petitioners who are citizens and taxpayers.

Constitutionality Presumed.

It is a fundamental and well recognized principle of constitutional law that legislative enactments are presumed to be constitutional and that the courts should not declare

an act to be unconstitutional unless it is clearly so; and if there is doubt, the express will of the Legislature should be sustained, and that where a statute is subject to two constructions, one conforming to and the other contravening the Constitution, the Courts will adopt that construction which conforms to the Constitution.

The following decisions of our Supreme Court have expressly held to this effect:

—*State* v. *Coyle*, 7 Okla. Cr. 50, 122 Pac. 243.

Ex parte Hunnicutt, 7 Okla. 213, 123 Pac. 179.

Stout v. *State ex rel Caldwell*, 36 Okla. 744, 130 Pac. 553.

Ex parte Ambler, 11 Okla. 449, 148 Pac. 1061.

Lahoma Oil Co. v. *State Industrial Commission*, 71 Okla. 160, 175 Pac. 836.

Dickinson v. *Perry*, 75 Okla. 25, 181 Pac. 504.

Ledegar v. *Bockoven*, 77 Okla. 58, 185 Pac. 1097.

Leach v. *State*, 188 Pac. 118, 17 Okla. Cr. 322.

In conformity to the uniform holding of Federal and State Courts generally, the Oklahoma Supreme Court, in the case of *Lovejoy* v. *State*, 194 Pac. 1087, has said:

> "The judiciary is not concerned with the wisdom of statutory enactments. We have no power to amend or repeal constitutional or statutory provisions, although we may disapprove of them. Arguments against such provisions must be addressed to the people or to the Legislature."

Classification for Legislative Purposes.

The general principle governing the classification of legislative subject matters as affected by the Fourteenth Amendment to the Constitution of the United States requiring equal protection of the law, is set forth in Corpus Juris, Vol. 12, page 1128, in the following language:

> "However, class legislation is not expressly named in the prohibitions of the State and Federal Constitutions; and neither the Fourteenth Amendment nor the provision of the State Constitutions prohibiting the granting of special privileges affect the validity of state statutes making reasonable classifications of persons or things for the various purposes of legislation. If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid. And this is true even though the act confers different rights or imposes different burdens on the several classes. It is not necessary for the statute to show on its face the reason for the classifications adopted. In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the Legislature enacting it, the question of classification being primarily for the Legislature. A statute will be sustained where the basis for classification made by it could have seemed reasonable to the Legislature, even though such basis seems to the courts to be unreasonable. Legislative discretion in this matter is not subject to review by the courts, except to the extent of determining whether the classifications adopted is arbitrary, unreasonable and unjust. As in all the other cases involving the validity of statutes, all reasonable doubts are to be resolved in favor of upholding the validity of legislation establishing a classification, and the legislative judgment as to classification can be overthrown by the courts only when it is clearly erroneous. Classification must

be reasonable and not merely arbitrary. There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classification. But in order that the act may be valid the classification must rest on real differences in the subject matter, having some relation to the classification made and the objects to be accomplished by the legislation, and must affect alike all persons or things within a particular class. A statute making no classification of the persons or property to which it applies is not void merely because there is room for a reasonable classification of such subjects."

The courts of practically every State in the Union have, at different times, had under consideration the question of reasonable classification for legislative purposes, and have supported the action by their legislators in that respect as being within the province of the legislative department of the States. *Willis et al.* v. *City of Ft. Smith*, 182 S. W. 275, involving the distinction between jitney busses and ordinary taxicabs and other motor vehicles and imposing different requirements.

People v. *Jordan*, 156 Pac. 451, holding that:

"Where from the facts before the court it was reasonable to assume there were sufficient causes for the Legislature to create a class, the courts will not disturb the act of the Legislature."

Commonwealth of Massachusetts v. *Walter M. Libbey*, 49 L. R. A. (N. S.) 879, holding that:

"If a legitimate purpose of a statute can be found, the Legislature must be presumed to have had that purpose in mind."

Ole Mathison v. *Minneapolis Street Railway Co.*, L. R. A. 1916D, page 412, saying:

> "When the Legislature has determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which do not apply to the other, such determination is binding upon the courts unless they can point out that the distinction is purely fanciful and arbitrary, and that no substantial or logical basis exists therefor."

Embree v. *Kansas City National Boulevard Road Dist.*, 166 S. W. 282, holding that:

> "A statute which embraces all persons and things that naturally belong to the same class and are similarly situated, and on whom it must operate uniformly and equally, is not invalid as class legislation."

State v. *Woodman*, 67 Pac. 1113, saying:

> "Very many laws do not operate alike upon all citizens of the State. They are, nevertheless, general in their application, because they include all citizens who are in a like situation."

City of Pond Creek et al. v. *Haskell*, 97 Pac. 338, holding:

> "A court will never declare an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, unconstitutional and void, unless the nullity and invalidity of the act are paced, in its judgment, beyond a reasonable doubt."

State ex rel Lindsey v. *Derbyshire*, 140 Pac. 534, holding:

> "But while the courts frequently find and assign reasons for legislative classification, yet it is by no

means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law-making body which do not appear upon the face of the statute, and for the courts to strike it down because not readily perceptible might well be criticized as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action. The true question in each case is: Is the classification capricious, unreasonable or arbitrary? Citing *State ex rel* v. *Condon*, 108 Tenn. 82, 65 S. W. 871. Also *State ex rel Bell* v. *Frazier*, 36 Ore. 178, 59 Pac. 5; *McCarter* v. *McKelvey*, 78 N. J. Law 3, 74 Atl. 316, 130 Am. St. Rep. 583; *Lommen* v. *Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450; *Lloyd* v. *Smith*, 176 Pa. 213, 35 Atl. 199; *Cook* v. *State*, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; *Eckerson* v. *Des Moines*, 137 Iowa 452, 115 N. W. 177; *Pierce* v. *Kimball*, 9 Green. (Me.), 54, 23 Am. Dec. 537; *State ex rel Hunt* v. *Taussick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; 1 Lewis' Sutherland Statutory Construction (2nd Ed.) 217."

State v. *Fraternal Knights & Ladies*, 77 Pac. 500, saying:

"Equal protection of the laws given by the Constitution requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations."

Also:

"It must be assumed that it was the object of the Legislature to establish such regulative conditions as will best serve and protect the rights of the citizens."

In the case of *Fidelity Mutual Life Association* v. *Mat-*

tler, 185 U. S. 308, 46 L. ed. 922, this Court, in discussing the classification of life insurance companies, which was the matter involved in the case, said:

> "The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from *mutual benefit and relief associations* doing business through lodges and benevolent associations of the character mentioned in the Texas statute is not an arbitrary classification, but rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

In the case of *Hayes* v. *State of Missouri,* 120 U. S. 82, 30 L. ed. 581, this Court, in discussing the matter of the reasonableness of classification of a statute of the State of Missouri providing that in all capital cases except in cities having a population of over 100,000 inhabitants the State should be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, said:

> "The Fourteenth Amendment to the Constitution of the United States does not probihit legislation which is limited in objects to which it is directed, or by the territory within which it is to operate. *It merely requires that all persons subjected to such legislation shall be*

treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.''

The Court then, speaking through Mr. Justice Field, referred to a former decision of this Court which has become one of the leading decisions upon this question, to-wit, the case of *Barbier* v. *Connolly,* 113 U. S. 27, 28 L. ed. 923, where this Court in discussing class legislation, said:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Also in the case of *Jessie Norton Torrence Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S. 283, 42 L. ed. 1037, this Court, in discussing the right of a State to classify upon the basis of lineal and collateral relationship to the testator or intestate, made by a statute taxing inheritances, in upholding the statute as being constitutional and free from objection that it violated the Fourteenth Amendment, said:

> "Is the act open to this criticism? The clause of the Fourteenth Amendment specially evoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Citing *Kentucky*

Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414."

The Court, continuing, then says:

> "It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and the liabilities imposed. Citing *Hayes* v. *Missouri,* 120 U. S. 68, *supra.*"

Continuing, the Court says:

> "But what is the test of likeness and unlikeness, circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustrations, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County* v. *Kimball,* 102 U. S. 704, 26 L. ed. 242, that this Court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive State legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.'
>
> "The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a differ-

ent kind of corporation than B, it may subject A to a different rule of responsibility to servants than B; *Missouri P. Ry. Co.* v. *Mackey*, 127 U. S. 205 (32:107) to a different measure of damages than B (*Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26 (32:585), and it permits special legislation in all of its varities. *Missouri P. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis R. Co.* v. *Herrick*, 127 U. S. 210 (32:109); *Duncan* v. *Missouri*, 152 U. S. 377 (38:485).

"In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley in *Bell's Cap R'd Co.* v. *Pennsylvania*, 134 U. S. 232-240 (33:892-896.)"

In the case of *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, this Court, in discussing the right of the State Legislature to classify in legislation, in discussing a statute of the State of Kentucky providing for liability for damages done to an employe of the railway company by reason of the negligence of its agents, mismanagement of its engineers or other employes, and in which the classification of employes as being arbitrary, is charged, the Court through Mr. Justice Field, said:

"The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact.

> The greatest part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect to both of the privileges conferred and the liabilities imposed."

The Court at the close of its opinion said:

> "As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufacturies."

Also in the case of *C. B. & Q. Railroad Co.* v. *Iowa*, 94 U. S. 155, 24 L. ed. 94, this Court, in the opinion by Mr. Justice Waite, in discussing and passing upon a statute of

the State of Iowa which divided the railroads of the State into classes according to business and established a maximum of rates for each of the classes and against which the charge was brought that it afforded an unequal protection of the laws and the Fourteenth Amendment to the Constitution, Mr. Justice Waite said:

> "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of *McAunich* v. *R. R. Co.*, 20 Iowa 343, in speaking of legislation as to classes, said: 'These laws are general and uniform not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.' This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class.
>
> "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under

any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

In the case of *Thos. Watson et al.* v. *Joseph Nevin*, 128 U. S. 578, 32 L. ed. 544, this Court had before it a statute enacted by the State of Kentucky, involving the question of local assessments for public improvements, and providing that a lien should attach for the amount so assessed against property. The law is attacked under the Fourteenth Amendment to the Constitution of the United States on the ground that it deprived plaintiff of property without due process of law and upon the ground that it denied the equal protection of the law. In deciding the case, Chief Justice Fuller discusses the reasonableness of the classification involved in the legislation, and citing the case of *Davidson* v. *New Orleans*, 96 U. S. 104, 24 L. ed. 619, said:

"It is not possible to hold that a party has without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power.

Spencer v. *Merchant*, 125 U. S. 345, 31 L. ed. 763; *Stanley* v. *Albany Co.*, 121 U. S. 550, 30 L. ed. 1003; *Mobile Co.* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569; *U. S.* v. *Memphis*, 97 U. S. 284, 24 L. ed. 937; *Laramie Co.* v. *Albany Co.*, 92 U. S. 307, 23 L. ed. 552; and whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. *Wurtz* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 529, 24 L. ed. 737. The remedy for abuse is in the state courts; for, in the language of Mr. Justice Field in *Mobile* v. *Kimball*, 'This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.' "

In the recent case of *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, this Court passed upon the question of whether or not a statute adopted by the Legislature of the State of Rhode Island, which provided for compensation in connection with eminent domain, and providing that certain mill owners should be allowed to recover the cost of removing his machinery to a new location within the northeastern States, and denying a similar right to one who desired to move to a location elsewhere, and in which the statute was questioned as being violative of the Fourteenth Amendment and equal protection clause, the Court said:

"Injury to a business carried on upon lands taken for public use, it is generall held, does not constitute an element of just compensation. (*Cox* v. *Philadelphia H. & P. R. Co.*, 213 Pa. 506, 114 Am. St. Rep. 970, 64 Atl. 729; 2 Lewis Em. Dom., 3rd Ed., 727), in the absence of a statute expressly allowing it (*Whiting* v. *Com.*, 196 Mass. 468, 82 N. E. 670; *Oakland* v. *Pacific*

Coast Lumber & Mill Co., 171 Cal. 392, 398, 153 Pac. 705). *This statute therefore does not deny a right; it grants one, and limits it to a business already established;* we cannot say that such a classification is unreasonable or arbitrary; and certainly it is not clearly so. * * *

"If the geographical limitation upon the liability to pay for the removal of machinery could be said to bring about a classification, the principles just discussed would control. The right is extended to all mill owners who choose to avail themselves of it, to recover the cost of removal within the defined territory."

In the case of *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129, 66 L. ed. 166, there was involved an act of the Legislature of the State of Mississippi, designated as the Anti-Gin Act, which prohibits corporations, whether organized under the laws of that State or authorized under the laws thereof to do any local business therein, from owning or operating any cotton gin, where such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. The statute is attacked upon the ground that it is violative of the Fourteenth Amendment to the Constitution of the United States, and upon the ground that it does not afford equal protection of the law. The language of Mr. Justice Clarke in rendering the opinion holding against such contention, is as follows:

"Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a State, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a State may impose conditions, in its discretion, upon the right

of such a corporation to do business, within the State, even to the extent of excluding it altogether. *Horn Silver Min. Co.* v. *New York,* 143 U. S. 305, 36 L. ed. 134, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Baltic Min. Co.* v. *Massachusetts,* 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 S. Ct. Rep. 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions, applicable to corporations only. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 343, 344, 53 L. ed. 530, 541, 542, 22 Sup. Ct. Rep. 370; *Baltic Min. Co.* v. *Massachusetts, supra.* And see *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 64 L. ed. 396, 398, 40 Sup. Ct. Rep. 304; *American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Williams* v. *Fears,* 179 U. S. 270, 276, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefor not arbitrary, will be sustained against an attack based upon equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C 160, and cases cited; *Rast* v. *Van Deman & L. Co.,* 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A 421, 38 Sup. Ct. Rep. 370, Ann. Cas. 1917B 455.

"The record before us above shows that before the law assailed was enacted, cotton gins had been oper-

ated in Mississippi by individuals, as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals, and we think it may be assumed under the rule stated, that because of the larger capital required, and perhaps for other reasons, oil mills and cotton gins may have been operated in that State only by corporations, and that for this reason the restraint of the evil aimed at by the act of the Legislature could be accomplished by controlling corporations only. Assuming this to be the fact when the law was enacted, obviously the classification objected to cannot be pronounced so without reasonable basis as to be arbitrary."

Also in the case of *Chicago, Rock Island & Pacific Ry. Co.* v. *D. J. Perry*, 259 U. S. 548, 66 L. ed. 1056, this Court had under consideration a statute of the State of Oklahoma known as the Service Letter Law, *requiring a public service corporation* to furnish through its superintendent or manager, to any employe discharged or voluntarily quitting its service, a letter setting forth the nature and duration of the service rendered by him, and state for what cause he was discharged, if discharged, or for what cause he quit the service. The Court in its opinion by Mr. Justice Pitney, in reply to the assertion that such a statute violated the Fourteenth Amendment to the Constitution of the United States and failed to afford equal protection of the laws, said:

"The contention that the Service Letter Law denies to plaintiff in error the equal protection of the laws is rested upon the fact that it is made to apply to public service corporations (and contractors working for

them) to the exclusion of other corporations, individuals and partnerships, said to employ labor under similar circumstances. This is described as arbitrary classification. We are not advised of the precise reasons why the Legislature chose to put the policy of this statute into effect as to public service corporations, without going further; nor is it worth while to inquire. It may have been that the public had a greater interest in the personnel of the public service corporations, or that the Legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the Legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they knew what they were about. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157, 158, 63 L. ed. 527, 531, 39 Sup. Ct. Rep. 227, and cases cited."

In the case of *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, *supra*, cited by Justice Pitney in the Service Letter Law case, which involved the law of the State of Texas with respect to employers' liability and compensation, and which was attacked upon the ground that it was violative of the Fourteenth Amendment to the Constitution guaranteeing equal protection of the laws to all citizens and prohibiting class legislation, for the reason that it exempted from its provisions person injured or killed as a result of personal injuries received by domestic servants, farm laborers and employes of any person, firm or corporation operating any railway as a common carrier, or laborers engaged in working for a cotton gin, or employes of any person, firm or corporation having in his or their em-

ploy not more than five employes, Mr. Justice Pitney, in disposing of this contention, said:

"However, we are clear that the classification cannot be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Texas 110, 111, 185 S. W. 556, 11 N. C. C. A. 873): 'employes of railroads, those of employers having less than five employes, domestic servants, farm laborers and gin laborers, are excluded from the operation of the act, but this was doubtless for reasons that the Legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employes, known experience as to hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employes engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary.'

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. *Rosenthal* v. *New York*, 326 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B 71; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 649, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215, 58 L. ed. 1276, 1283, 53

L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; *Kookee Consol. Coke Co.* v. *Taylor,* 234 U. S. 224, 227, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; *Miller* v. *Wilson,* 236 U. S. 373, 384, 59 L. ed. 628, 632, L. R. A. 1915F 829, 35 Sup. Ct. Rep. 342.

"The burden being upon him who attacks a law for unconstitutionality the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In the case of *Miller* v. *Wilson,* 236 U. S. 373, 59 L. ed. 628, cited by Justice Pitney in the Texas Power & Light case, *supra,* there was involved a statute of the State of California forbidding the employment of women in certain specified work for more than eight hours a day, including hotels, but which act did not include boarding houses, lodging houses, etc., and in which the act was attacked as violative of the Fourteenth Amendment to the Constitution and the equal protection clause thereof. The Court said, Mr. Justice Hughes delivering the opinion:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144, 58 L. ed. 543, 34 Sup. Ct. Rep. 361. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed the clearest. As has been said, it may 'proceed cautiously, step by step, and if an evil is specially experienced in a particular branch of business it is not necessary that the prohibition should be couched in all-embracing terms.' *Carrol* v.

Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 227, 58 L. ed. 1238, 1289, 34 Sup. Ct. Rep. 856. Upon this principle, which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels." Citing numerous decisions both of the Supreme Court of the United States and State Courts.

In the case of *Citizens' Teleph. Co.* v. *Fuller*, 229 U. S. 327, 57 L. ed. 1212, this Court discusses the act of the Michigan Legislature in classifying for taxation purposes, telephone companies, which act exempts the property of telephone companies whose gross receipts for the year do not exceed $500.00 from *ad valorem* taxes. This act was attacked in the Supreme Court as being violative of the Fourteenth Amendment to the Constitution, and as denying equal protection of the laws, for the reason that the telephone companies exempted all practically fell into what was known as rural or mutually operated companies organized by associations of farmers living along the lines. The Court, through Mr. Justice McKenna, in its opinion in discussing this contention, and overruling same, does so in the following language:

"It is manifest therefore that there are marked differences between the taxed and non-taxed companies,

and the differences might be pronounced arbitrary if the rule urged by appellant should be applied; that is, that in taxation of property no circumstances should be considered but its value; or, to use appellant's words, 'each dollar's worth should be treated alike.' But such rigid equality has not been enforced. In Michigan, the Legislature has the power of prescribing the subjects of taxation and exemption notwithstanding the Constitution of the State requires the Legislature to provide a uniform rule of taxation, except on property paying specific taxes. *People ex rel St. Mary's Falls Ship Canal Co.* v. *Auditor General,* 7 Mich. 84; *Chippewa County* v. *Auditor General,* 65 Mich. 408, 32 N. W. 651; *National Loan & Investment Co.* v. *Detroit,* 136 Mich. 451, 99 N. W. 380. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the Legislature. We said in *American Sugar Refin. Co.* v. *Louisiana,* 172 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43, that from time out of mind it has been the policy of this Government to classify for the purpose of taxation, and a discrimination was supported between taxation of producers and manufacturers of products, and yet in *Billings* v. *Illinois,* 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272, we compared the rule with that in *Connally* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, where a distinction between buyers of products and the producers of them was held an illegal discrimination.

"In *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say 'that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation.' It was pointed out that to

give it that effect would destroy the constitutional provision and laws of some of the States which, while enjoining uniformity of taxation, permitted exemptions which were deemed material, and that 'it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries; and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

The case just referred to cites in support of the conclusion reached the case of *American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89, 45 L. ed. 102, which involved a statute of the State of Louisiana which exempted from license tax sugar cane planters, who might desire in connection with the production of sugar cane to engage in the refining of their products into sugar, whereas those not classified as planters were requqired to pay the license tax and secure license. The American Sugar Refining Company attacked this statute as being unconstitutional under the Fourteenth Amendment to the Constitution and as denying equal protection of the laws. In disposing of this contention, which was denied, Justice Brown did so with the following observation:

"Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by the Act of August 2 of 1813 a license tax upon the retailers of wines and spirits for the purpose of providing for the expense of the war with Great Britain, it was further enacted by an Act of February 8th, 1815 (3 Stat. at L. 205, Chapter 40) that it should not be construed (to extend to vine dressers who sell at the

place where the same is made, wine of their own growth; nor shall any vine dresser for vending solely at the place where the same is made, wine of his own growth, be compelled to take out license as the retailer of wine). So, too, in the Internal Revenue Act of 1862 (12 Stat. at L. 432, Chapter 119), a license tax was imposed (64) upon retail dealers in all goods, wares and merchandise, but with a proviso in (66) that the act should not be construed 'to require a license for the sale of goods, wares and merchandise, made or produced and sold by the manufacturer or producer at the manufactory or place where same is made or produced; to vendors who sell at the place where the same is made wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines for sick, lame or diseased persons.' Another paragraph of the same section (64) exempts distillers who sell the products of their own stills from a tax as wholesale dealers in liquors, while no questions of the power of Congress is involved these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds.

"So, too, this Court has repeated occasion to sustain discriminations founded upon reasons much more obscure than this. Thus, in *Richmond F. & P. R. Co .v. Richmond,* 96 U. S. 521, 24 L. ed. 724, a municipal ordinance was sustained declaring that no car or vehicle of any kind 'belonging to or used by the Richmond, Fredericksburg & Pontomac Railroad Company shall be drawn or propelled by steam' upon a certain street although no other company was named in the ordinance. The court held that as no other corporation had the right to run locomotives in that street, no other corporation should be in a like situation, and that the ordinance, while apparently limited in its operation, was general in its effect, as it applied to all who could do what was prohibited. 'All laws should be general in their operation, but all places within the same city

do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street or even from one part of a street, it would be sometimes unreasonable to exclude them from all.' In *Pembina Consol. Silver Min. & Mill Co.* v. *Pennsylvania,* 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, it was decided that the equal protection clause did not prohibit a State from requiring, for the admission within its limits of a corporation of another State, such conditions as it chooses, though in that case it exacted a license tax from such corporations, which it did not exact from corporations of its own creation. In *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, it was said that this clause did not forbid special legislation, 'and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.' To the same effect is *Ralston* v. *Vevn,* 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

"The power of taxation under this provision was fully considered in *Bells Gap Co.* v. *Penna.,* 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness.' All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution. See, also, *Home Ins. Co.* v. *New York,*

134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *St. Louis, I. M. & S. R. Co.* v. *Paul*, 173 U. S. 404, 43 L ed. 746, 19 Sup. Ct. Rep. 419.

"In *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a state statute defining an express company to be such as carry on the business of transportation on contracts for hire with railroad or steam boat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter and vehicles of their own. This case is specially pertinent to the one under consideration. See, also, *Giozza* v. *Tierman*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern Railroad Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Western U. Teleg. Co.* v. *Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

"The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business and refine sugar purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to exemption it must appear, first, that he is a farmer or planter; second, that he grinds the cane as well as refines the sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business equal protection of the laws.

"The judgment of the Supreme Court of the State of Louisiana is affirmed."

The State of Wisconsin passed an act requiring every company transacting the business of life insurance within the State (excepting only fraternal societies having lodge organizations and insuring only the lives of their own members) to annually, on or before March 1, pay in lieu of all taxes for any purpose authorized by the laws of this State (except taxes on real estate) certain prescribed license fees for transacting such business. The Northwestern Mutual Life Insurance Company attacked the statute as being violative of the Fourteenth Amendment to the Constitution of the United States on account of discrimination as between companies not fraternal and having lodge organization, and only insuring the lives of their own members, and others engaged in the insurance business and subject to the act. This Court, in disposing of this contention (*N. W. Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 133, 62 L. ed. 1035) concluded the opinion by Mr. Justice Day in the following language:

> "As to the alleged discrimination between old line level premium companies and beneficial associations, which are exempted from taxation under their statute, we think the differences are plain. The fraternal and beneficial features are wanting in organizations like that of the Northwestern Company. The ascertainment and collection of premiums and payments for insurance are upon wholly different plans. As to the alleged discrimination in favor of stipulated premium companies and assessment companies, the plaintiff in

> error in its brief says that no domestic company of these classes and but one foreign company existed in Wisconsin in 1912, and that as to this its argument as to discrimination in favor of foreign level premium companies applies. What we have already said disposes of that contention. We find no reason to disagree with the Supreme Court of Wisconsin in the conclusion that differences upon which classification rests in this statute are not fanciful, but real and substantial, and that the dissimilarities in treatment fall short of that arbitrary classification which amounts to a denial of the equal protection of the laws."

Also in the case of *Sunday Lake Iron Co.* v. *Township of Wakefield,* 247 U. S. 350, 62 L. ed. 1154, this Court had under consideration a statute of the State of Michigan, in which it was charged that a discrimination had resulted in the enactment of a tax statute in that State which denied the equal protection of the laws to complainant, for the reason that its property was assessed at its full value while other taxable property in the same class is greatly undervalued by the taxing officers. Mr. Justice McReynolds, in delivering the opinion of the Court upon this question, said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35,

37, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. Head Money cases (*Edye* v. *Robertson*), 112 U. S. 580, 595, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247; *Pittsburgh C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 435, 38 L. ed. 1021, 1039, 14 Sup. Ct. Rep. 1114; *Maish* v. *Arizona,* 164 U. S. 599, 611, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193; *Adams Exp. Co.* v. *Ohio State Auditor,* 165 U. S. 194, 229, 41 L. ed. 683, 698, 17 Sup. Ct. Rep. 305; *New York* v. *Barker,* 179 U. S. 279, 284, 285, 45 L. ed. 190. 193, 196, 21 Sup. Ct. Rep. 121; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 608, 49 L. ed. 615, 617, 25 Sup. Ct. Rep. 342; *Chicago, B. & Q. R. Co.* v. *Babcock,* 204 U. S. 585, 597, 51 L. ed. 636, 640, 27 Sup. Ct. Rep. 326."

In the case of *Omaechevarria* v. *Idaho,* 246 U. S. 343. 62 L. ed. 769, this Court in construing a statute of the State of Idaho which prohibited the grazing of sheep on federal public domain upon a range previously occupied by cattle, which act was attacked upon the grounds that it violated the Fourteenth Amendment to the Constitution in that it denied the equal protection of the law and was discriminatory against the sheep owners, Mr. Justice Brandeis, speaking for the Court, said:

"We cannot say that the measure adopted by the State is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on

the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted. And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy. For experience shows that sheep do not require protection against encroachment by cattle, and that cattle ranges are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differently than cattle has been generally recognized."

Also in the case of *Travellers Insurance Co.* v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, this Court, in passing upon the classification of corporations for taxation purposes, against which was directed the allegation that it was violative of the Fourteenth Amendment to the Constitution and discriminated against certain properties owned by such corporations, Mr. Justice Brewer, in disposing of the case, said:

"But further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the Legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents."

In a very recent decision by this Court, in the case of

General American Tank Corp. v. *Day,* 70 L. ed. 239, a statute of the State of Louisiana is attacked by the tank company upon the ground that one of the revenue acts of that State discriminated against the tank car company in that it unreasonably classified its property for the purpose of taxation, thus imposing a hardship upon it, in violation of the Fourteenth Amendment to the Constitution of the United States. Mr. Justice Stone, speaking for the Supreme Court upon this question, says:

> "Where the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to minute differences between its application in practice, and the application of the taxing statute or statutes to which it is complimentary."

In the case of *Billings* v. *Illinois,* 188 U. S. 97, this Court, in considering a statute enacted by the State of Illinois, in which it was alleged that as interpreted and enforced by the state courts the act discriminated as between lineal descendants of a decedent, and collateral heirs or strangers in blood. It was therefore attacked upon the ground that it violated the Fourteenth Amendment to the Constitution of the United States as affording unequal protection of the laws. Mr. Justice McKenna, in disposing

of this question, referring to the Magoun case, *supra*, among other things said:

> "We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection.' But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars, and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes.
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> "If the purpose is within the legal powers of the Legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a State in its purposes and in the execution of them must be allowed a wide range of discretion, and that this Court will not make itself a harbor in which can be found 'a refuge from ill-advised, unequal and oppressive' legislation. 102 U. S. 691, 26 L. ed. 238."

The case of *Grainger* v. *Douglas Park Jockey Club*, 148 Fed. 513, the Circuit Court of Appeals for the Sixth Circuit, in considering a statute passed by the State of Kentucky regulating horse racing, but exempting fair associations and trotting races from the provisions requiring license and license taxes, authorizing the conduct of

same, the Court, speaking through Judge Cochran, laid down certain rules with respect to the determination of the validity of statutes classifying for the purpose of license. Citing the case of *Ex parte Christensen,* 43 Fed. 243, the Court said:

"It is to be noted in this connection that the question whether said act confers arbitrary power is not to be determined by the fact that the power conferred may have been exercised arbitrarily as to the appellee. If such is the case, possibly it may have some bearing on the interpretation of the power conferred. In the Yick Wo case, Mr. Justice Matthews seems to intimate that the arbitrary action of the board of supervisors complained of therein did have an interpreting effect on the nature of the power conferred. But we think Judge Sawyer struck a true note in the case of *Ex parte Christensen* (C. C.), 43 Fed. 243, when he said:

" 'The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is in fact administered. Its capability of being abused is the test. * * * Usually all persons engaged in the same business may be said to include all persons similarly situated, but not always; and in such cases that the classification embraces all persons engaged in the same business is not a correct test as to its validity.'

"The Court further says:

" 'The touchstone, therefore, of the validity of legislation depriving one of his liberty or property or making a discrimination amongst the persons to whom it is applicable is the public welfare. If the deprivation or classification has a real and substantial relation thereto it is valid, otherwise it is not. * * * If, then, in a given case the court must admit that it is possible for a reasonable man to conceive that the leg-

islation in question may subserve the public welfare, it must leave it alone.' Quoting Mr. Justice Holmes in the *Otis and Gasman case*, 187 U. S. 606, 47 L. ed. 323, where it was said:

"'While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise, a Constitution, instead of embodying all relatively fundamental rules of right as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semperubique et ab omnibus.*'

"And if further, in a given case, the court must admit that it is possible for the Legislature to have known some fact not known to it which would make the legislation in question conducive to the public welfare, it must keep its hands off. In the Powell case, it was agreed that the oleomargarine which the defendant was charged with having for sale, a portion of which he sold, was in packages so marked as to let purchasers know that it was oleomargarine and it appeared from the evidence offered and rejected that it was wholesome and nutritious, yet the statute and the conviction under it were upheld because it was conceived that it was possible that most kinds of oleomargarine in the market contained ingredients that were or might become injurious to health, a fact as to which the court could not take judicial knowledge, but might have been known to the Legislature and caused the passage of the law."

In the case of *Owen County Burley Tobacco Society* v. *Brumback*, 107 S. W. 710, the Court of Appeals of Ken-

tucky, in construing a statute of that State legalizing the pooling of tobacco and other farm products for the purpose of classifying, grading and selling the same in order that a higher price may be obtained therefor than could be received by selling the crops individually, and authorizing the parties forming the pool to select agents to hold the crops for the purpose of classifying and grading, the court in considering an attack upon the statute as being an arbitrary classification and violative of the Constitutional prohibition, said:

> "Nor does this right depend for its validity upon the police power of the State, as independent of this power the right to select and classify exists. *Hager, Auditor of Commonwealth* v. *Remington Typewriter Co.*, 105 S. W. 399, 32 Ky. Law Rep. 189. Looking at the act from this viewpoint, and as simply selecting a class of persons to deal with, it must be considered as within the power of the Legislature to enact it. The act does not attempt to regulate or control or prescribe any other occupation or business. What effect, if any, the privilege of combination conferred on farmers, to the end that greater price might be obtained for the product raised by them, would have on other classes of persons, if the act in terms excluding other persons from its operation and effect, or if other persons were complaining, is not before me. The act, although confining the privileges granted by it to farmers, does not in terms prohibit other persons or corporations from pooling their products, or from, pledging them to an agent to dispose of. *The act is classification, but not exclusion. It confers privileges upon a class, but does not withhold from others their enjoyment.* The validity or reach of the act, as applied to or affecting others than farmers, I express no opinion concerning. No person is objecting be-

cause he is denied privileges or immunities conferred upon this class of our citizens. It is assailed by one of the class for whose benefit it was enacted, and who upon the record before me must be treated as having voluntarily entered into the agreement authorized by it. If this act undertook to confer on farmers the exclusive privilege of combining and pooling their crops, to the end that a greater price might be obtained therefor, and expressly denied to other classes or persons the right to combine or pool their products for the same purpose, or if it should be so construed, it is plain that it would be a direct violation, not only of Section 3 of the Bill of Rights, but of the Fourteenth Amendment to the Constitution of the United States. The reading of Section 3 of the Bill of Rights, with its simple, yet strong language, so easily understood that no person of ordinary intelligence can mistake its meaning, leaves no room to doubt that 'no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men. Nor is it open to controversy that if the right was conferred upon certain specified persons or a class to combine or pool their crops or products in order that a better price might be obtained for them, and all other persons and classes were excluded from and denied this privilege, that it would be granting to the favored class 'exclusive separate privileges.' This point was expressly decided in *Simpson* v. *K. B. & L. Assn.*, 101 Ky. 496, 41 S. W. 570, and *Gordon* v. *Winchester B. & L. Assn.*, 12 Bush. 110, 23 Am. Rep. 713, and the correctness of the ruling is so manifest that it does not need further elaboration.

"Treating the act solely as a selection of a class of persons upon whom specified privileges are conferred, it is not in contravention of the Fourteenth Amendment to the Constitution of the United States, providing that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall a State de-

prive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' This section has been frequently considered by the Supreme Court of the United States, and it has been ruled that it does not deny the State the right to classify and select occupations, trades and professions. As stated in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed. 1037: 'In other words, a State may distinguish, select and classify objects of legislation and necessarily this power must have a wide range of discretion. It is not without limitation, of course.' And in *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533, 38 L. ed. 892, the Court said: 'Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Governments, might be obnoxious to the constitutional prohibition.' To the same effect (*Gulf, Colorado & Santa Fe. R. Co.* v. *Ellis,* 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666). Nor does this amendment prohibit the State from granting rights or conferring privileges on persons or classes, but only declares that when rights or privileges are conferred, all persons and classes that may be fairly included within the scope of the law granting the privileges or immunities shall have the benefit of them, whether so intended or not. *Hayes* v. *State of Missouri,* 120 U. S. 68, 7 Sup. Ct. 350, 31 L. ed. 578; *Barbier* v. *Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 546, 22 Sup. Ct. 431, 46 L. ed. 679; *Commonwealth* v. *Johnson,* 78 Ky. 509. This act does not in terms discriminate against any other person or class of persons; and if it could be held to be discriminatory it is clear that that question cannot be raised by the defendant. He has not been discriminated against. He has not been denied any privilege or immunity that is granted to any other person or class of persons, nor has he been denied the equal protection of the law.

"It is next insisted that it is violative of Section 198 of the Constitution, before quoted. In considering this aspect of the case, I shall assume that the purpose of the act is as stated in it—to permit the pooling and combining of crops for the purpose of classifying, grading and disposing of the same in order that a greater or higher price may be obtained therefor than could be received by selling the crops separately. It is manifest that the real, and in fact, only, object of the act was to enable the producers by pooling and combination to obtain better prices than they could get if they sold their crops separately and as distinct individuals. The right to select, grade, store and hold is merely a means to the accomplishment of the chief end, which is to get a greater price. It would be idle to say that the legislators intended only that the producers might combine for the purpose of grading, classifying and storing their crops, and this was the sole purpose of the act; and it was not contemplated or intended that by this process of grading, classification and storing they should regulate or control the market, and thereby obtain a higher price for the crops than they could command as individuals. It would be equally absurd to say to the farmer that this act only allowed him to grade and classify, but not to fix, regulate and control the price of the product, when he knows that the end to be accomplished was to control, regulate and fix the price by placing all the crops in the hands of a general agent, with power to hold them until a reasonable and adequate price could be obtained. This is the only construction the act is susceptible of, in my judgment."

In the case of *Commonwealth* v. *Hodges,* 125 S. W. 692, construing the same statute which had been construed in the Owen County Burley Tobacco Company case as amended in 1908, and which was under attack because of discriminatory and arbritary classification, the Court of

Appeals of Kentucky, in its opinion, in referring to the Owen County case, said:

> "The question for the court is, what did the Legislature really direct? And this intention must be sought in the whole of the act taken together, and other acts in *pari materia*. It is not the custom of Legislatures to declare their purposes as such. Legislation is usually enacted from time to time bearing on particular subjects. The courts presume that the Legislature intended all its enactments on a given subject to constitute a consistent treatment within constitutional limitations of the whole subject. Provisions of the Constitutions are therefore to be read in conjunction with such statutes, and all of them—the provisions of the Constitutions, State and Federal, and the several enactments of the Legislature—will be treated as a harmonious, consistent system, in preference to supposing that, literally construed, one is repugnant to the others, and some enactments in consequence wholly fail. As, then, the Legislature had left the Act of 1890 upon the statute books, and had enacted the one of 1906, upon the same subject, meaning by it to confer the right upon some to pool their property for the purpose and to the extent not forbidden by Section 198 of the Constitution, we must construe these two statutes and the section of the Constitution together. And, in doing so, we must take into view the Fourteenth Amendment to the Constitution of the United States, as it also was presumably in the legislative mind in enacting the last statute. If it be construed that the Legislature intended a discrimination between farmers and all others, their enactment would be void. We must reject that view of it, if any other can be made to apply. If, however, it be construed that the Act of 1906 operates to confer upon all persons the same benefits, as was intimated in the opinion in *Owen County Burley Tobacco Co.* v. *Brumback, supra,* then there is no discrimination. As that construction is possible under the language employed, and as it would

sustain the validity of the act, it must be adopted. *It, therefore, follows that appellee and all others have the right, under the existing laws in Kentucky, to pool their property, or combine their capital and other resources so as to get no more than the real value of their property when sold in the market.*"

In the case of *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011, this Court, passing upon a Kansas statute of 1909 regulating insurance and exempting farmers' mutual insurance companies organized and doing business under the laws of the State, and insuring only farm property, from the legislative scheme for regulation, the Court, in an opinion by Mr. Justice McKenna, upholding the classification and the exception, says:

"The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the State, and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been presented in the lower court; it is, however, covered by the assignments of error.

"The provision of the statute is: 'That nothing in this act shall effect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statute of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them, the German Alliance Company cannot avail itself of the discrim-

ination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a Legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union County Nat. Bank,* 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the Legislature. *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 32 L. ed. 552, 19 Sup. Ct. Rep. 281."

In the case of *Dark Tobacco Growers Co-op. Assn. et al* v. *Dunn,* 266 S. W. Rep. 308, the Supreme Court of Kentucky passed upon a statute of the State of Kentucky, known as the Bingham Co-operative Marketing Act of 1922, which was attacked upon the ground that it violated the Fourteenth Amendment to the Federal Constitution in that it did not afford equal protection. This statute authorized:

"Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade; nor an illegal monopoly, nor any attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized by this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."

The purpose of the act had been set forth in Section 1 as follows:

> "In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation, and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed."

The Court, in answering the objections urged, and particularly answering counsel's argument based upon the citation of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, in which the Supreme Court of the United States held that the Illinois Anti-Trust statute violated the provisions of the Fourteenth Amendment because it excepted from the provision of the act agricultural products or livestock while in the hands of the producer or raiser, the Court said:

> "In that case the court was dealing with a statute which made trusts or combinations in restraint of trade a crime, but which excepted from its provisions 'producers of agriculture and raisers of live stock.' Certainly no reasonable justification could be offered in support of a classification of that nature. If it is wrong for a merchant to monopolize a particular business, it is likewise wrong for a farmer to do so. The principle is the same in both cases. If the act here involved has for its object the destruction of competition and the creation of a monopoly, then it violates the equal protection clause of the Constitution, and is invalid."

The Court also said in discussing this principle:

> "Statistics show that the price paid by the con-

sumer for farm products is sufficiently high, but that the producer receives only 35 per cent of this sum, the middleman (so to speak) receiving 65 per cent. One of the main objects of the association is to bring about a more just apportionment of the price paid by the consumer. The righteousness of this claim on the part of the producer is generally conceded.

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"We are impressed with the idea that co-operative marketing of farm products is an economic necessity. It was championed by all three parties in the recent national political contest. It has been enacted into law by the Congress of the United States (The Capper-Volstead Act, U. S. Comp. St., Ann. Supp. 1923, 8716½, 8716½a), and by the Legislatures in two-thirds of the States. The Legislature of Tennessee passed such an act in 1923 (Chapter 100). The policy of the State as expressed by the Legislature, is found in Section 5 of said act, as follows:

" 'That every group of persons contemplating the organization of an association under the act is urged to communicate with the College of Agriculture, University of Tennessee, who will inform them whatever survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

" 'It is here recognized that agricultural is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organizations permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industry; and that the public interest urgently needs to prevent the migration from the farm to the city in order to

keep up farm production and to preserve the agricultural supply of the Nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose the farmer should secure special guidance and instructive data from the College of Agriculture of the University of Tennessee.'

"The validity of these acts has been sustained by every court passing upon them. *Burley Tobacco Growers Co-op. Assn.* v. *Gardner, decided* February 24, 1924, but not yet published; *Northern Wisconsin Pool* v. *Bekkedal* (Wis., 1924), 197 N. W. 936; *Dark Tobacco Growers Assn.* v. *Potter* (1925), 201 Ky. 441, 257 S. W. 35; *Tobacco Growers Co-op. Assn.* v. *Jones* (1923), 185 N. C. 265, 117 S. E. 174; *Brown* v. *Staple Cotton Assn.* (1923), 132 Miss. 859, 96 So. 849; *Texas Farm Bureau Assn.* v. *Stovall,* Tex. Sup. Ct. (1923), 253 S. W. 1101; *Kansas Wheat Growers Co-op. Assn.* v. *Schulte* (1923), 113 Kan. 72, 216 Pac. 311; *Oregon Growers* v. *Lentz* (1923), 107 Ore. 561, 212 Pac. 811; *Washington Cranberry Growers Assn.* v. *Moore* (1922) 117 Wash. 430, 201 Pac. 773, 204 Pac. 811; *Citrus Fruit Assn.* v. *Yeoman* (1921), 51 Cal. App. 759, 197 Pac. 959; *Ex parte Baldwin County Producers Corp.* (1919) 203 Ala. 345, 83 So. 69; *Casterland Milk Co.* v. *Shentz* (1919), 179 N. Y. 131."

The Court then quotes from the *Burley Tobacco Growers Assn.* v. *Gardner, supra,* calling particular attention to the fact that these cases are clearly distinguishable from the case of *Connolly* v. *Union Sewer Pipe Co.* After discussing other cases cited upon this question, the Court then concludes:

"In our opinion, *Connolly* v. *Union Sewer Pipe Co.* is not in point nor in conflict with the conclusions which

we have reached. On the other hand, our decision finds support in later utterances of the Supreme Court of the United States in the cases enumerated in the Mason case, in which the Court holds that in suits to dissolve the cause violative of the anti-trust statute it is not a question of whether the corporation has power to do so, but what it has done and is doing for that act is directed against monopoly and not against an expectation of it."

In the case of *Stebbins* v. *Riley,* 268 U. S. 137, 69 L. ed. .885, a recent decision of this Court, in an opinion by Mr. Justice Stone, the same question as was involved in the earlier case of *Magoun* v. *Illinois Trust & Savings Bank, supra,* is considered. The decision passes upon the classification contained in a provision of the Inheritance Tax Act of the State of California. In disposing of the contention that the classification violated the guaranty of the Fourteenth Amendment in the equal protection of the laws, the Court said:

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a State. As was said in *Magoun* v. *Illinois Trust & Savings Bank, supra,* at page 293 (42 L. ed. 1042, 18 Sup. Ct. Rep. 594):

" 'It only prescribes that that law have the attribute of equality of operation and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. * * * In other words, the State may distinguish, select and classify objects of legislation

and necessarily this power must have a wide range of discretion.'

"The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. *Magoun* v. *Illinois Trust & Savings Bank, supra; F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 64 L. ed. 969, 40 Sup. Ct. Rep. 560.

"It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 553."

The opinion of the lower court, written by Honorable R. L. Williams, Judge of the United States Court for the Eastern District of the State of Oklahoma, and concurred in by the other two Judges, cited with approval the cases hereinbefore cited of *C. B. & Q. R. R. Co.* v. *Iowa,* 94 U. S. 155; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Chi-*

cago, Rock Island & Pacific Ry. Co. v. *D. J. Perry,* 259 U. S. 548; *Omaechevarri* v. *Idaho,* 246 U. S. 343; *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *German Alliance Ins. Co.* v. *Lou's,* 233 U. S. 389; *Dark Tobacco Growers Co-op. Assn.* v. *Dunn,* 266 S. W. 308; *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 247 Pac. 390; *Planters Cotton & Ginning Co.* v. *West,* 82 Okla. 145, 247 Pac. 390; and based the opinion of the Court on these decisions as well as other decisions cited by this Court in those cases. The Court then says:

> "The gin is to be operated co-operatively and is thereby placed in a classification by the Legislature of the State. We do not reach a conclusion that such a classification is so unreasonable that it should be judicially annulled. If it is organized under the statute making that classification, and is so operated, the fact that others besides growers and producers are permitted to become incorporators, does not operate to render the classification violative of the Fourteenth Amendment. They are limited as to amount of stock and voting participation and as to profits. The idea of the law and the trend of contemporary thought of law-givers and expressions of courts alike is to encourage co-operative dealing in the products of agriculture. The complainant rests his case under the contention of a violation of the Federal constitutional provision guaranteeing equal protection of the law, which seems to be without substantial merit."

The case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. M. Assn.,* 72 L. ed. — (not yet officially reported), affirms the same case which is cited in the brief

of appellees, in the first appeal to this Court, and in our opinion rules the case now before the Court for consideration. In that case a statute of the State of Kentucky, known as the Bingham Act, authorizing the incorporation of non-profit co-operative associations for the orderly marketing of agricultural products, was under consideration. The statute provided that *only producers may become members and that the corporation may contract only with them for marketing such products.* It declares that these contracts shall not be illegal, prescribes penalties for interfering therewith, and further provides that the association shall not be deemed a conspiracy, illegal combination or monopoly. The Liberty Warehouse Company, a Kentucky corporation, violated the terms and provisions of this statute by selling pledged tobacco, whereupon suit was brought by the Burley Tobacco Growers Co-op. M. Association, incorporated under the Bingham Act, for the prescribed penalty provided by the act, of $500.00 and attorney's fees. Judgment was recovered therefor. The case came to this Court on writ of error, where the statute was attacked for several reasons; one of which was that Sections 26 and 27 of the Act violates the Fourteenth Amendment to the Constitution in that said sections and each of them breaches defendant's privileges and immunity as a citizen of the United States and deprives defendant of its corporate life, liberty and property without due process of law, and denies to it the equal protection of the laws. This Court,

in an opinion by Mr. Justice McReynolds, after stating that this contention suggests the only federal question open for consideration, said:

> "Certainly the statute impaired no right of the warehouse company guaranteed by the Fourteenth Amendment by merely authorizing corporations with membership limited to agriculturists and permitting contracts for purchase and re-sale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The State may declare its own policy as to such matters. * * *
>
> "Do the provisions of the Bingham Act which afford peculiar protection to marketing contracts with members of the association, deprive the warehouse company of equal protection of the laws, or conflict with the due process clause of the Fourteenth Amendment, because without reasonable basis and purely arbitrary? These questions may be fairly said to arise upon the present record.
>
> "The statute penalizes all who wittingly solicit, persuade or induce an association member to break his marketing contract. *It does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal protection clause.*"

We pause here to call the attention of the Court to the similarity of the circumstances of this case to the one now before the Court. Nobody is denied by the statute of Oklahoma the right to secure a license for the operation of a co-operative gin in the manner prescribed. No more rigorous penalties fall upon the commercial ginners of the

State than fall upon others similarly situated, for the reason that any one hundred citizens of the State, regardless of occupation, may secure a license upon equal terms and without discrimination.

The Court then distinguishes the Liberty Warehouse case from the case of *Connally* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, *supra,* which was much relied upon in that case and which is also much relied upon in this case. The Court says:

> "But there the circumstances differed radically from those here presented; and always to determine whether equal protection is denied, there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared: 'The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' This Court held that because of the exemption, the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference * * * no one could lawfully do what the warehouse company did."

So here: everyone may do what the Co-operative Gin Company of Durant did, under the same circumstances and conditions. That is, any one hundred citizens and taxpay-

ers within the State of Oklahoma may, by the identical steps which are reasonable, secure a co-operative license upon presentation of a petition signed by one hundred citizens, to the Corporation Commission, upon equal terms as did the Co-operative Company of Durant.

Distinction Between the Two Classes of Ginners Upon Which the Act Is Based.

The ordinary commercial ginner within the State of Oklahoma may gin either as an individual, a co-partnership or a corporation. There is no statute, rule or regulation which limits him in any wise in the enjoyment of the full proceeds of his earning under the rate fixed. He usually is engaged not only in ginning cotton as a public service, but also in the purchase of cotton seed and in the purchase of cotton for profit (which is an independent, private business not subject to control). At least 50 per cent of the gins so operated are owned and controlled by the cotton seed crushers operating cotton seed oil mills within the State of Oklahoma, which concerns operate the gins not entirely for the purpose of rendering a public service, but for the purpose of collecting cotton and cotton seed at a central point, to-wit: they gin to the end that they may be enabled to purchase it under favorable conditions. The cotton seed extracted from a farmer's cotton at such gins is ordinarily mixed with the general mass of seed extracted from other cotton and sold by the owner to the gin opera-

tor, which, in the instance, is the cotton seed crusher. Such ginning concerns under favorable conditions, have been known to profit in one season to as high degree as 150 per cent. As a matter of fact, it is alleged in the answer filed to the bill in the lower court, that appellant made an average profit on the cotton ginned at the gins in which he was interested in Durant, of 85 per cent for the year preceding the filing of this cause of action.

There is no statutory restriction upon corporations or individuals or others engaged in this character of ginning. Upon the other hand, we call attention to the restrictions which are thrown around co-operative concerns, and the conditions upon which they are required by statute to operate businesses conducted by them within the State of Oklahoma.

The Legislature of the State of Oklahoma has enacted two separate and distinct statutes authorizing the organizations of co-operative concerns. The first of these acts is in Article 16 of Chapter 34, Compiled Oklahoma Statutes 1921, and the purpose for which such an organization may be formed is set forth in Section 5599, Compiled Oklahoma Statutes 1921, as amended by Chapter 181, Session Laws 1923, and reads as follows:

> "Any number of persons, not less than five, engaged in the production of agricultural or horticultural products may act together and organize co-operative associations, not having capital stock and not conducted for profit, for mutual help in collectively processing,

preparing for market, picking, storing, shipping, handling and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities; and may have marketing agencies in common with other like or similar associations; and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such association may make advances to members, and such members may hire, rent, or buy their farm supplies and machinery from or through the association; provided, that such association shall be operated for the *mutual benefit of the members thereof,* only as such producers; and no member of the association shall have more than one vote because of the membership capital he may own therein, and such associations shall not pay dividends on membership capital in excess of 8 percentum per annum. And cooperative associations not having capital stock now existing in Oklahoma, exercising, or attempting to exercise, corporate rights and powers, or to perform duties as a corporation, for the purpose or any of the purposes aforesaid, are hereby validated, and are granted all of the rights and powers, and subjected to all of the restrictions and limitations of this Act, as herein amended; and are granted for the enforcement of existing as well as subsequent contracts, all of the rights and remedies herein provided."

It will be observed that concerns organized under this statute with no capital stock, are not conducted for profit, and are organized for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling and marketing such products of persons engaged in the production of agricultural or horticultural products and the manufacturing or the making of the by-products thereof.

As stated in the outset, the act under consideration does not define what is meant by the term "to be operated co-operatively." Therefore if it is possible by any manner of legal means for a concern so operating a gin, to be differently classified from the ordinary commercial ginner, then the act must stand regardless of the fact that there might possibly be concerns attempting to operate gins in a manner which might be construed not to be co-operative. The remedy in that instance would not be against the Corporation Commission of the State of Oklahoma, or any state official or board, but then would be against the person so operating. Under this statute there certainly is an extreme distinction between concerns organized under it for the purpose of ginning cotton, not for profit, but for mutual self-help of those engaged in agricultural and horticultural business, and the ordinary commercial gin or ginner, as there could possibly be under any given circumstance.

Here are two entirely separate and distinct classes of concerns, not based upon the ownership, as stated by counsel, but upon the conditions affecting each and upon the manner of conducting the business, which have been held in all the cases to be a constitutional basis of classification.

As a matter of fact, such organizations as those permitted by the 1917 statute, quoted above, for the purpose

of self-help upon a non-profit basis, purely for the purpose of rendering service to the members of such organizations, in our opinion would not be subject to any character of regulation whatsoever, any more than a private individual would be subject to regulation in the construction and operation of a cotton gin plant solely for the purpose of ginning his own cotton. *Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas,* 262 U. S. 521, 67 L. ed. 1103, and cases cited.

However, in the instant case, the Durant Co-operative Gin Company was organized under the second of these acts, to-wit, the Act of 1919, found in Article 19, Chapter 34, Compiled Oklahoma Statutes 1921; the purpose of such concerns being stated in Section 5637 thereof as follows, to-wit:

> "Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, live stock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical or industrial business upon a co-operative plan, and with their associates, successors and assigns, may become and be a body politic and corporate by complying with the provisions of this act."

This statute *provides that any ten persons* within the State of Oklahoma, regardless of their occupation and regardless of the circumstances or conditions, may incorporate themselves into a co-operative corporation for the purpose of engaging in the business authorized, which clearly includes the business of ginning cotton within the State of

Oklahoma. The Choctaw Cotton Oil Company or the Chickasha Cotton Oil Company, or any other ginning interests within the State of Oklahoma could organize under the provisions of this statute, and upon application to the Corporation Commission, supported by a petition of one hundred citizens and taxpayers, could secure a license without further showing, just as farmers and business men may organize and present a petition supported by one hundred citizens and taxpayers and secure a license to gin cotton. There is absolutely no discrimination whatsoever as between persons belonging to the classes contemplated by the Legislature in distinguishing between co-operative ginners and ordinary ginners. In other words, the rule applies and is particularly applicable for the reason that it deals with all engaged in the same business under circumstances and conditions exactly the same.

We have taken the time and gone to the trouble of investigating the distinction which may exist between an ordinary person, individual or corporation engaged in the ginning of cotton for profit, and the co-operative association who receives license and which is organized under the 1919 statute. The distinctions are found in Sections 5641 to 5642, inclusive, Compiled Oklahoma Statutes 1921, and are as follows:

First: The co-operative association is specially authorized by an act of the Legislature.

Second: The organization is distinct with respect to the number of incorporators and as to the purpose for which it may be incorporated; the ordinary corporation being allowed to incorporate with not less than three members, while the co-operative association must have not less than ten members.

Third: The statute provides different powers from those possessed by the ordinary corporate concern.

Fourth: The statute in Section 5642 provides that no stock shall be sold for less than par, while the stock of an ordinary corporation or the interest in an ordinary ginning concern may be sold for any consideration which may be agreed upon.

Fifth: The statute provides in Section 5642 that not less than 20 per cent of the value of the stock must be paid before business is commenced, while an ordinary individual, person or corporation can commence business whether any of the capital stock had been paid in or not, providing his credit justifies.

Sixth: The same section provides that no certificates of stock shall be issued until fully paid, while a member of an ordinary corporation would be entitled to a certificate at any time which he could convince the secretary of his ability to pay, either at present or in the future, for same.

Seventh: The same section provides that no person shall be allowed to own any stock except by consent of the

board of directors, while the stock of ordinary concerns may be purchased upon the market by anyone who may be able to agree with the seller.

Eighth: The same section provides that not more than 5 per cent of stock and not more than $500.00 can be owned by one person, while the ordinary concern, either partnership or corporation, can be owned *in toto* by any person able to purchase and own same.

Ninth: The voting rights of the stockholders are restricted to one vote, regardless of the amount of stock or the interest possessed, while other corporations in the same business, the right to vote is determined by the amount of stock owned.

Tenth: The statute, in Section 5647, makes the board of directors personally and individually liable for indebtedness of the concern in excess of the amount of subscribed capital stock and surplus, while ordinary concerns the liability of a shareholder is only to the extent of his share.

Eleventh: Section 5649 declares it shall be illegal for the directors of any such corporation to declare or pay any dividends or portion of earnings or profit to members or non-members when the corporation is insolvent, or when it would be rendered insolvent by such payment, and provides that the board of directors shall be jointly and severally liable for all the debts of the corporation, then existing, for any such payment.

Twelfth: Section 5648 requires the placing of not less than 10 per cent of any earnings accruing in a surplus or reserve fund until such fund shall equal not less than 50 per cent of the paid-up capital stock, which would require five years. There is no such requirement as to the operation of an ordinary gin or ordinary person, individual or corporation.

Thirteenth: The same section restricts dividends payable upon stock to 6 per cent per annum, while the ordinary corporation is unlimited in the amount of dividends, and it is well known that in some instances they realize and pay out in excess of 100 per cent per annum.

Fourteenth: This section also provides that 5 per cent of the earnings may be set aside for educational purposes, whereas no such provision is made or suggested with respect to the operation of the ordinary gin operator.

Fifteenth: The same section provides that the remainder of such net earnings and profit shall be apportioned and paid to the members ratably upon the amount of the production or amount of the patronage of such members.

Sixteenth: The section further provides that the association may apportion such earnings to non-members upon the basis of the amount of patronage.

Seventeenth: The act restricts the use of the word

"co-operative" to persons organizing under the provisions thereof.

Eighteenth: The act further provides that upon the violation of any such concerns of any of the provisions of the act, that the charter may be forfeited and withdrawn.

These distinctions and their bases are all set forth in the answer filed to the bill in the lower court, and are found at pages 15, 16, 17 and 18 of the record, and they are nowhere denied.

The lower court, composed of the three judges, recited at considerable length the disinguishing characteristics of a co-operative concern organized either under the 1917 statute (Article 16, Chapter 34, C. O. S. 1921), or under the 1919 statute, and which justified the Legislature in making the classification which they made in the amendment to the statute under consideration (R. 39-40. Also R. 47-48-49-50-51-52-53-54), particulary with respect to the 1919 Act, which is Article 19 of Chapter 34, C. O. S. 1921. The Court, after discussing these distinguishing characteristics, said:

> "A gin organized under the Act of 1919 'to be run co-operatively,' does not render said proviso repugnant to the Fourteenth Amendment to the Federal Constitution."

In such an organization as is provided for, we see an attempt upon the part of the Legislature to provide a method and means which may incidentally redound to the

benefit of the cotton growers of the State, but which permits any person, regardless of his occupation, to take advantage of the same provision. It contemplates that those persons so desiring may associate themselves together for the purpose of mutual benefit, restricting the amount of profit to be enjoyed, providing for educational benefits and providing for some benefits to non-members, providing such non-members may choose to patronize such a concern. In the language of one of the decisions cited heretofore: "In so doing we believe that the Legislature knows what they were about," and that this Court will not, in the face of the authorities referred to herein, all of which lay down the principle that courts should not interfere with legislative discretion unless the classification and the legislation is so apparently unreasonable, arbitrary and oppressive as not to be able to esape the conclusion that it clearly violates the provision of the constitutional amendment, grant the relief prayed for.

It is a fundamental proposition of law that courts will take judicial notice of conditions affecting the agricultural interests of the country. *Tobacco Growers Co-op. Assn.* v. *Jones,* 185 N. C. 265, 117 S. C. 174; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assn.* 271 S. W. 695; *Minnesota Wheat Growers Co-op. Marketing Assn.* v. *Huggins,* 203 N. W. 420.

Moreover, the Legislature of the State of Oklahoma,

composed of representatives from various districts of the State of Oklahoma, familiar with conditions in every portion of the State with respect to agricultural conditions and with respect to the evil to be corrected, under the decisions, certainly ought to be supported in their judgment as to just what provision would be necessary in order to strike at the evil existing. Also, the three Federal Judges composing the special court, were men more or less familiar with the conditions sought to be relieved, and their judgment is worthy of consideration in that respect. They have twice upheld the act by their unanimous decisions, the first of which decision has already been sustained by this Court: *Frost* v. *Corporation Commission,* 274 U. S. 719, 47 Sup. Ct. Rep. 589, 71 L. ed. —. The Supreme Court of the State of Oklahoma supporting this statute, is composed of judges, all citizens of the State of Oklahoma from the various districts which they represent, and who have a special knowledge of the conditions with respect to the relationship as between the cotton grower and ginning and seed crusher interests. Their judgment is worthy of careful and serious consideration.

As referred to in the American Sugar Refinery case, *supra,* as well as other cases, Congress itself has repeatedly legislated upon matters in which they distinguish and classify as between the right of the producer who might desire to manufacture his product and the manufacturer merely engaged in manufacture. Also in the Sherman Anti-

Trust Act, distinctions are made, based upon the desire of Congress to favor agricultural interests. Also in the Income Tax Statute of 1921, and in Section 231 of said Act, farmers' co-operative associations, such as may be organized under the 1919 statute, are expressly exempt from income tax payments.

CONCLUSION.

It is, therefore, respectfully submitted that the special court composed of three Federal Judges for the Western District of Oklahoma, should be sustained in this appeal in its denial of the temporary injunction.

Respectfully submitted,

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